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## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 360

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FRED W. FINK, PETITIONER,

*vs.*

SHEPARD STEAMSHIP COMPANY

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF OREGON

---

PETITION FOR CERTIORARI FILED OCTOBER 18, 1948.

CERTIORARI GRANTED NOVEMBER 22, 1948.



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

FRED W. FINK, PETITIONER,

vs.

SHEPARD STEAMSHIP COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF OREGON

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[fol. 1]

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**IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH**

No. 154 958

FRED W. FINK, Plaintiff,

vs.

SHEPARD STEAMSHIP COMPANY, a corporation, Defendant

FIRST AMENDED COMPLAINT—Filed September 3, 1946

Comes now the plaintiff, leave of court having first had and obtained, and files this his first amended complaint, and for cause of action against the above named defendant, complains and alleges:

**I**

That at all times herein mentioned the defendant was and now is a corporation, organized and existing under and by virtue of the laws of the State of Maine, with a principal office in the City of Portland, Multnomah County, Oregon; that said defendant has for several years last past, and particularly on or about the 2nd day of August, 1943, engaged generally in the control, navigation, management and operation and had in its possession certain merchant steamships operating in coastwise and foreign trade in commerce, and particularly on said date was in possession of, controlled, navigated, managed and operated a certain steamship known as the SS George Davidson, and was responsible for maintaining said steamship in proper repair and for equipping said vessel.

**II**

That on or about the 2nd day of August, 1943, plaintiff was employed by defendant as an able-bodied seaman on said vessel, at the agreed and stipulated wage of \$100.00 per month and found and overtime and 100% bonus for sea duty; that on said date, at about the hour of 7:30 P.M., while said vessel was off the coast of Tasmania, plaintiff was ordered and directed by his superior officer to dump [fol. 2] overboard the contents of a certain garbage can on said vessel; that to accomplish said purpose, plaintiff was required to lift said garbage can, which weighed in excess



of 150 pounds, over the guardrail approximately 4 feet in height; that there was a heavy sea running at the time, and as plaintiff was lifting said can, the same was caused to be violently precipitated backward against plaintiff while he was endeavoring to control the same, resulting in injuries to plaintiff as hereinafter set forth.

### III

That defendant was reckless, careless and negligent in the following particulars:

1. In ordering and directing plaintiff to empty said garbage can when there was a heavy sea running.
2. In ordering and directing plaintiff to lift and maneuver said heavy garbage can, taking into consideration the weight and bulk of the same.
3. In failing and neglecting to have sufficient workmen to perform said task, when other workmen were then and there available.

### IV

That by reason of the negligence of said defendant, plaintiff suffered a severe straining, twisting and tearing of the muscles, tendons, ligaments, soft tissues and sinews of his lower back and was made to suffer and now suffers intense pain and distress in his lower back, and plaintiff was compelled to remain bedfast on board said vessel for eleven days immediately following said accident and was hospitalized at Bombay, India, for eight days, and has since said date been under medical care; that plaintiff is informed and believes and therefore alleges that he has suffered a permanent disability and that there is a permanent weakness of the muscles, tendons, ligaments and soft tissues of his lower back, all to his damage in the sum of \$25,000.00.

### V.

That prior to said injuries, plaintiff was a healthy, robust and able-bodied man of the age of 35 years, with a life expectancy of 31.78 years; that plaintiff has lost wages on account of said injuries in the sum of \$4,000.00, and has incurred doctor and medical expenses in the sum of \$50.00 and will incur further doctor, hospital and medical expenses, and reserves the right to amend his complaint at the time of trial to show the full amount of special damages.

## VI

The plaintiff files this action under section 33 of the Merchant Marine Act of 1920, and elects to proceed in the Circuit Court of the state of Oregon, for the county of Multnomah, with the right of trial by jury.

Wherefore, plaintiff demands judgment against the above named defendant for the full sum of Twenty-five thousand (\$25,000.00) Dollars, general damages, and the further sum of from thousand dollars special damages for loss of wages, and Fifty (\$50.00) Dollars special damages, and for his costs and disbursements incurred herein.

(S.) Green & Landye & Nels Peterson, Edwin D. Hicks, Attorneys for Plaintiff.

[fol. 5]

[File endorsement omitted]

IN CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

ANSWER TO FIRST AMENDED COMPLAINT—Filed September 10, 1946

Defendant Shepard Steamship Company, for answer to the First Amended Complaint, admits, denies and alleges as follows:

## I

For answer to Article I of the First Amended Complaint defendant admits that it is a corporation organized under the laws of the State of Maine, but denies all of the remaining allegations of said Article, except the defendant admits that it has an office in the City of Portland, Multnomah County, Oregon.

## II

For answer to Article II of the First Amended Complaint defendant expressly denies that plaintiff was employed by defendant in said vessel, or at all. Defendant denies that plaintiff was at the times mentioned in the First Amended Complaint, or at any other time, ever employed by this defendant. Defendant denies knowledge or information sufficient to form a belief as to the remaining allegations of said Article, and therefore denies the same.

## III

For answer to Article III defendant denies the allegations thereof and each of them.

## IV

For answer to Article IV defendant denies the allegations thereof and each of them.

[fol. 6]

## V

For answer to Article V defendant denies knowledge or information sufficient to form a belief as to plaintiff's health, age and life expectancy, and therefore denies the same, and defendant expressly denies the remaining allegations of said Article V.

## VI

For answer to Article VI defendant admits that plaintiff has filed this action in the Circuit Court of the State of Oregon, for the County of Multnomah, and admits that plaintiff has attempted to file this action under Section 33 of the Merchant Marine Act of 1920, but defendant denies that plaintiff has the legal right to bring this action in this Court or under said statute.

Wherefore, Having fully answered plaintiff's First Amended Complaint, defendant prays that plaintiff take nothing and that defendant may have judgment for its cost and disbursements incurred herein.

(S.) Wood, Matthiessen & Wood, (S.) Erskine B. Wood, Attorneys for Defendant.

*Duly sworn to by Earl Sanders. Jurat omitted in printing.*

[fol. 7]

[File endorsement omitted]

IN CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

o VERDICT—Filed September 18, 1946

We, the jury, duly empanelled and sworn to try the above entitled civil action, do find our verdict in favor of the plain-

tiff Fred W. Fink, and against the defendant Shepard Steamship Company, a corporation, and assess plaintiff's damages in the sum of \$9000.00.

Dated this 17th day of September, 1946.

(S.) Robert A. Pitts, Foreman.

[fol. 8]. IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR  
THE COUNTY OF MULTNOMAH

FRED W. FINK, Plaintiff,

v.

SHEPARD STEAMSHIP COMPANY, a corporation, Defendant

JUDGMENT—Filed September 18, 1946

This cause having come on for trial on Thursday, the 12th day of September, 1946, before the Honorable Walter L. Tooze, Judge of the above entitled Court, plaintiff appearing in person and by his attorneys Green & Landye, Nels Peterson and Edwin D. Hicks, defendant appearing by his attorneys Wood, Matthiessen and Wood and Erskine Wood, Jr., and the Court having first received evidence covering the question whether plaintiff had the legal right to bring this action against the defendant pursuant to the provisions of Section 33 of the Merchant Marine Act of 1920, otherwise known as the Jones Act, and the Court having determined as a matter of law, from the evidence received upon the trial of such issue that the plaintiff had the legal right to maintain this action against the defendant company under said act aforesaid, and on the 16th day of September, 1946, a [fol. 9] jury having been duly impaneled and sworn to try the questions of fact applicable to said cause, did hear the opening statements of the respective counsel, the testimony produced on behalf of the plaintiff and the testimony produced on behalf of the defendant, whereupon the jury, having heard the closing arguments of respective counsel and having been instructed by the Court as to the law, the jury did thereupon retire for its deliberation upon the 17th day of September, 1946, and upon said 17th day of September, 1946, did return its verdict in favor of the plaintiff, Fred W. Fink, and against the defendant, Shepard Steamship Company, a corporation, which said verdict was received by



the Court and is now on file with the Clerk of the above entitled cause as a part of the records herein, said verdict being in words and figures as follows:

"We the jury, duly impaneled and sworn to try the above entitled civil action, do find our verdict in favor of the plaintiff, Fred W. Fink, and against the defendant, Shepard Steamship Company, a corporation, and assess plaintiff's damages in the sum of Nine Thousand Dollars (\$9,000.00).

Dated this 17th day of September, 1946."

Robert A. Pitts (signed), Foreman.

Now, therefore, based upon said verdict, the Court does hereby enter its judgment herein in favor of the plaintiff, Fred W. Fink, and against the defendant, Shepard Steamship Company, a corporation, for the full sum of Nine Thousand Dollars (\$9,000.00), with interest thereon at the rate of 6% per annum from the date of the entry of this [fol. 10] judgment, and for costs in the sum of — Dollars, to be taxed with interest thereon at the rate of 6% per annum from the date of the entry of this judgment and that execution issue therefor.

Dated at Portland, Oregon, this 18th day of September, 1946.

Walter L. Tooze, Circuit Judge.

[fol. 11]

[File endorsement omitted]

IN CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT  
OR IN THE ALTERNATIVE

MOTION FOR NEW TRIAL—Filed September 26, 1946

Defendant moves that the judgment entered in this cause in favor of the plaintiff and against the defendant be set aside, and that judgment be entered in favor of the defendant notwithstanding the verdict rendered by the jury upon the following grounds:—

1. The Court should have granted defendant's motion made at the trial for judgment of involuntary non-suit, for the reason that plaintiff's evidence failed to show that de-

7  
fendant was plaintiff's employer, and plaintiff therefore failed to establish his right to sue this defendant as an employer under the Jones Act, sec. 33 of the Merchant Marine Act of 1920, Title 46 USCA sec. 688, and which grounds were more fully stated at the trial at the time of defendant's motion for judgment of involuntary non-suit.

2. The Court should have granted defendant's motion for judgment of involuntary non-suit made at the trial for the reason that plaintiff's case did not present substantial evidence of negligence on the part of the defendant to warrant submitting the issue of negligence to the jury, and which grounds were more fully stated at the trial at the time of defendant's motion for judgment of involuntary non-suit.

3. The Court should have granted defendant's motion for a directed verdict, which was made at the trial, for the [fols. 12-20] reason that under the evidence as a matter of law defendant was not the employer of the plaintiff within the terms of the Jones Act, and therefore plaintiff had no right to sue this defendant pursuant to the Jones Act, sec. 33 of the Merchant Marine Act of 1920, Title 46 USCA sec. 688, and which grounds were more fully stated at the trial of this cause.

4. The Court should have granted defendant's motion for a directed verdict made at the trial for the reason that there was no substantial evidence of negligence on the part of the defendant, and which grounds were more fully stated at the trial.

[fol. 21] IN CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

ORDER DENYING MOTIONS FOR JUDGMENT OR FOR NEW TRIAL

This matter coming on to be heard on motion of defendant for judgment notwithstanding the verdict and/or in the alternative for motion for new trial, and the Court having considered said motions respectively and the arguments of counsel proffered for and against the allowance of the same and the Court having, as of October 5, 1946, rendered its written opinion in respect to the issues arising upon such motions and the Court being otherwise fully informed in the premises, it is hereby

Ordered that the motion for judgment notwithstanding the verdict be and the same is hereby denied; it is further

Ordered that the said motion for new trial be and the same is hereby denied.

Dated this 14th day of October, 1946.

(sgd.) Walter Tooze, Circuit Judge.

[fol. 22]

MEMORANDUM OPINION

CIRCUIT COURT OF OREGON, FOURTH JUDICIAL DISTRICT

Department No. 8, Portland, Oregon

5 October 1946.

WALTER L. TOOZE, Judge,

Wood, Matthiessen & Wood, Attorney at Law, 1310 Yeon Building, Portland, Oregon.

Green & Landye, Attorneys at Law, Corbett Building Portland, Oregon.

No. 154,958

GENTLEMEN:

*Re: Fink v. Shepard SS Co.*

This matter is before the court upon defendant's Motion for Judgment Notwithstanding the Verdict or in the alternative Motion for New Trial.

Specifications Nos. 1, 2, 3 and 4 raise two distinct points, viz: Was plaintiff an employee of the defendant within the meaning of the Jones' Act, and if he was, is there sufficient substantial evidence in the record to establish negligence upon the part of the defendant.

As to the status of the plaintiff, the court gave this question very careful study and consideration during the trial of the case, and arrived at the conclusion that under the provisions of the Agency Agreement, the defendant was an owner pro hac vice, and for the purposes of this case the employer of plaintiff within the meaning of the Jones' Act. I find no substantial cause for changing that opinion. The [fols. 23-25] Clarification Act did not *change* in any respect the terms and conditions of the General Agency Agreement. If under those provisions, the so-called Agent was an owner pro hac vice as suggested by Mr. Justice Douglas in his

concurring opinion in the Hust case, such Agent continues to occupy that status under the same terms and conditions of the Agency Agreement, and such status is in no way affected by the provisions of the Clarification Act. With that in mind, this court concluded at the time of trial: "It is this court's conclusion that under the Hyst decision, all seamen employed on a vessel operated by a Steamship Company under a General Agency agreement such as is involved here, are employees of such General Agent, and may proceed at law and have a jury trial in all cases such as this, pursuant to the provisions of the Jones' Act." This disposes of specifications Nos. 1 and 3 of the Motion.

As to specifications 2 and 4, the court is firmly of the opinion that there was sufficient and substantial evidence on the trial to establish negligence on the part of defendant in one or more respects as charged in plaintiff's amended complaint, if the jury believed such evidence. The verdict in favor of the plaintiff would indicate such conviction on the part of the jury, and such verdict is conclusive upon this question.

The four specifications already noted were urged in support of defendant's motion for Judgment notwithstanding the verdict. That motion is denied.

[fol. 26] For the reasons stated, the Motions of the defendant will be denied, and defendant will be allowed exceptions to the court's rulings.

Very truly yours, Walter L. Tooze, Circuit Judge.

[fol. 27] IN CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed November 15, 1946

To Fred W. Fink and Green and Landye, B. A. Green and Edwin D. Hicks his attorneys:

You, and each of you, are hereby notified that in the above entitled cause of Fred W. Fink, Plaintiff, vs. Shepard Steamship Company, a corporation, Defendant, in the Circuit Court of the State of Oregon for the County of Multnomah an appeal is taken by defendant, Shepard Steamship Company, to the Supreme Court of the State of Oregon from the Judgment for Nine Thousand and no/100 (\$9,-



000.00) Dollars, with interest and costs, in favor of plaintiff and against defendant, entered in this court and cause the 18th day of September, 1946; and also from the Order entered in this Court and cause on the 14th day of October, 1946 denying defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial.

Dated November 15th, 1946.

Wood, Matthiessen & Wood, Erskine B. Wood, Attorneys for Defendant.

[fol. 28] Service of the foregoing notice accepted this 15th day of November, 1946.

Green & Landye, By B. A. Green, Edwin D. Hicks, THT.

On November 20, 1946, an Undertaking on appeal was duly filed, and copy thereof included in the transcript on appeal.

[fol. 29] IN THE SUPREME COURT OF OREGON

FRED W. FINK, Respondent,

v.

SHEPARD STEAMSHIP COMPANY, a corporation, Appellant  
Appeal from Circuit Court, Multnomah County

WALTER L. TOOTH, Judge.

Argued and submitted March 4, 1948.

Erskine B. Wood, of Portland, argued the cause for Appellant. With him on the brief were Wood, Matthiessen & Wood, of Portland.

Edwin D. Hicks, of Portland, argued the cause for Respondent. With him on the brief were Green & Landye, Nels Peterson, and Thomas H. Tongue III, of Portland.

H. G. Morison, Acting Assistant Attorney General of Washington, D. C.; Henry L. Hess, United States Attorney, of Portland; J. Frank Staley and Leavenworth Colby, Special Assistants to the Attorney General, Attorneys for the United States, of Washington, D. C., filed a brief for the United States as amicus curiae, urging reversal.

Lasher B. Gallagher, of Los Angeles, filed a brief as amicus curiae, urging reversal.

Before Rossman, Chief Justice, and Lusk, Belt, Kelly, Bailey and Brand, Justices.

LUSK, J.

Reversed.

# OPINION

[fol. 30] LUSK, J.

This case, like *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 90 L. ed. 1534, 66 S. Ct. 1218 (reversing 176 Or. 662, 158 P. (2d) 275), is concerned with the rights of seamen to recover for injuries sustained while employed on United States vessels as employees of the United States. There is but one point of difference: Hust was injured a few days before March 24, 1943, the effective date of Public Law 17 (78th Cong., 57 Stat. 45), otherwise known as the Clarification Act: while the plaintiff Fink was injured on August 2, 1943, after the act became effective.

Fink recovered a judgment based on the verdict of a jury from which the defendant has appealed. The principal question for decision here, as in the Hust case, is whether the plaintiff is entitled to maintain his action under the Jones Act, Act of March 4, 1915, 38 Stat. 1185, as amended June 5, 1920, 41 Stat. 1007 (46 U. S. C. 688), with right to trial by jury, or whether his sole remedy is in the federal court against the United States under the Suits in Admiralty Act, 41 Stat. 525 (46 U. S. C. 741). The question was raised on the trial by motions for nonsuit and a directed verdict, and later by motion for judgment notwithstanding the verdict, and the court's rulings denying these motions are assigned as error.

Plaintiff was an able-bodied seaman on the S. S. George Davidson, a Liberty ship owned and operated by the United States through the War Shipping Administration. The defendant steamship company managed certain business of the vessel as General Agent for the Administration under a General Agency Service Agreement designated "GAA 44-42," identical with that involved in the Hust case. Plaintiff was injured while the vessel was at sea as the result, he claims, of the negligence of his superior officer in [fol. 31] ordering him, unaided, to dump overboard the contents of an excessively heavy garbage can at a time when a strong sea was running.

It is the contention of the plaintiff that the *Hust* case, which held that a seaman injured under like circumstances was entitled to sue and recover from the agent under the Jones Act in a state court, with the right to trial by jury, controls the decision here. The defendant, on the other hand, asserts, first, that this case presents a question which the Supreme Court of the United States expressly declined to decide in the *Hust* case, namely, the effect of the Clarification Act upon seamen's remedies with respect to injuries incurred after March 24, 1943, and that the purpose of that act was to remit the injured seaman for vindication of his rights to a suit under the Suits in Admiralty Act against the United States in the federal court; and, second, that in any event, the *Hust* decision has been overruled by the later decision in *Caldarola v. Eckert*, 332 U. S. 155, 91 L. ed. 1566, 67 S. Ct. 1569. The ultimate position of the defendant is supported by a brief filed by the United States as *amicus curiae*, the reasoning in which, however, is very different in some respects from that of counsel for the defendant.

For a solution of these questions a careful examination of the ground of decision by the Supreme Court of the United States in the *Hust* case is necessary. As a background for that examination we start with a brief statement of what this court held when the case was before it. From an analysis of the terms of the agency agreement and a consideration of the evidence relating to the functions actually performed by the agent, we reached the conclusion that *Hust* was not an employee of the agent, but exclusively of the Government. It followed, in our view, that the remedy [fol. 32] given by the Jones Act, which was created only in favor of an employee against his employer for the latter's negligence, was not available to *Hust* in an action against *Moore-McCormack*. In reaching that conclusion we applied the familiar common law test for determining whether one is an employee of another, namely, "whether the latter has the right to order, direct and control the former in the performance of the work" (176 Or. 670). We held, further, that the General Agent was not owner of the vessel *pro hac vice*. There the opinion might have stopped but for the argument of the plaintiff that Congress had recognized the status of seamen on Government-owned vessels as employees of the agents in section 1 of the Clarification Act, here-

inafter set out. Upon this point this court held that the Act did not deal with the liability of agents. We said:

“We do not mean to suggest that the purpose of the law was to grant to agents immunity from suit for their own torts, but simply that it leaves the question of the agents' liability untouched. It does not purport to create between the seamen and general agents of the War Shipping Administration a relationship of employer and employee, which, but for the Act, would not exist, nor to impose upon such agents liability for a tort which they did not commit. The whole purpose and intent of Section 1, in our opinion, was to create and declare in favor of seamen employed by the United States rights and remedies against the United States.”  
(176 Or. 689.)

Entertaining these views, it became unnecessary for us to express an opinion as to whether the so-called retroactive provision of the Clarification Act, hereinafter set forth, upon which the decision of the Supreme Court of the United States to some extent turned, gave Hust an election to pursue a remedy which we had already held was never available to him.

• The Hust case was decided in the Supreme Court of the United States by a bench of seven judges. It was a four [fol. 33] to three decision. The opinion of the court was written by Mr. Justice Rutledge and concurred in by Justices Black, Douglas and Murphy. In addition, Mr. Justice Douglas wrote a concurring opinion in which Mr. Justice Black joined. A dissenting opinion by Mr. Justice Reed was concurred in by Justices Frankfurter and Burton.

The opinion of Mr. Justice Rutledge proceeds upon the following grounds: Prior to 1942, when the Government took over practically the entire merchant marine, seamen employed on vessels of the United States operated by private companies were even more favorably situated than privately employed seamen. The latter had their remedy under the Jones Act, and their rights under general maritime law and enforceable in admiralty, or by various forms of proceeding elsewhere. But seamen on Government vessels had not only their exclusive remedy against the Government or the appropriate governmental corporation under the Suits in Admiralty Act, but as well their rights under maritime law against the private company operating the



vessel as agent for the Government, including the right to sue the agent under the Jones Act. This latter right was one of the effects of the decision in *Brady v. Roosevelt U. S. Co.*, 317 U. S. 575, 87 L. ed. 471, 63 S. Ct. 425. The *Brady* case had overruled the decision in the *Lustgarten* case, reported under the name of *Johnson v. Fleet Corp.*, 280 U. S. 320, 74 L. ed. 451, 50 S. Ct. 118, that the remedy given by the Suits in Admiralty Act was intended to preclude suit against the agent. But to hold that *Hust* could not sue the agent under the Jones Act would be to restore the rule of the *Lustgarten* case and to overrule the *Brady* case. There must be more than mere implication for the destruction of settled rights. The conjunction of the acts of the Government [fol. 34] in taking over the merchant marine, with the Suits in Admiralty Act, is not sufficient basis for holding that it was the intention of Congress, or Congress and the President, to deprive seamen on United States vessels of any of the rights enumerated. This is especially true in view of uncertainties and possible hardships which would result from such a decision. While *Hust*, as the Supreme Court of Oregon held, may have been technically an employee of the United States, yet, within the spirit of the Jones Act, the agent was sufficiently his employer to be suable under that act, citing *Labor Board v. Hearst Publications*, 322 U. S. 111, 88 L. ed. 1170, 64 S. Ct. 851. The technical relation of employer and employee had been shifted from the General Agent to the Government "for purposes relevant to ultimate wartime control of marine employees, without at the same time disrupting their normal applicable rights and remedies." It is a fallacy to say that the case is governed by the common law rules of private agency, more particularly the test of ultimate control over the acts of the alleged employee.

This view, the opinion continues, is confirmed by the so-called retroactive or elective provision of section 1 of the Clarification Act, which reads:

"Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of

action accrued, such election to be made in accordance with the rules and regulations prescribed by the Administrator, War Shipping Administration."

\* The fact that Congress has given this election to seamen whose causes of action arose before the Clarification Act became effective, shows that the Suits in Admiralty Act was not intended to be the exclusive remedy in such cases. Otherwise there would be no election. Although Congress [fol. 35] did not enumerate the specific rights which it considered seamen to have prior to the Clarification Act, and after the industry's transfer to Government control, the intent was clear to preserve all such rights and remedies as may have remained in existence unaffected by the transfer, including the rights and remedies provided by the Jones Act. This result accords with various provisions of the General Service Agreement. The Clarification Act in its prospective operation is not before the court, and no suggestion is made as to its effect on seamen's rights.

Mr. Justice Douglas, in his concurring opinion, concluded from an examination of the provisions of the General Service Agreement that the General Agent "had a most substantial control over the operations of the vessels"; that it was in fact owner of them *pro hac vice*, and was "therefore the employer and responsible for this personal injury claim."

The dissenting opinion of Mr. Justice Reed denied liability of the General Agent for reasons substantially the same as those which this court expressed. He called attention to the Supreme Court's holding in *Robinson v. Baltimore & Ohio R. Co.*, 237 U. S. 84, 94, 59 L. ed. 849, 35 S. Ct. 491, that "Congress used the words 'employee' and 'employed' in the statute (i. e. the Jones Act) in their natural sense, and intended to describe the conventional relation of employer and employee." He said that under the agency contract the agent only managed certain matters connected with the ship for the United States, and made the crew available to the Master, a United States agent, for employment by the Master for the account of the United States. "Such a contract makes the United States the employer under the Merchant Marine Act, not the Master and not respondent, the General Agent." (p. 740) Referring to section 2 of the Suits in Admiralty Act, which gives to employees of the United States upon merchant vessels of the United States a right of action against the vessel to be

[fol. 36] enforced by a libel *in personam* in admiralty, without right to trial by jury, and to the doubts which sometimes arose when the War Shipping Administration became the operator of practically the entire merchant marine as to whether a particular vessel was a merchant vessel or not, he said:

“ \* \* \* Therefore to clarify this situation and to assure all ‘employees of the United States through the War Shipping Administration’ all ‘rights’ for ‘injuries’ applicable to seamen ‘employed on privately owned and operated American vessels,’ Congress enacted an act to clarify the law relating to functions of the Administration (the Clarification Act), and declared its purpose in no uncertain terms to grant the power to enforce these rights only through the Suits in Admiralty Act.” (pp. 741, 742.)

Of the retroactive provision of section 1 of the Clarification Act he said:

“As there might be instances where a seaman was an employee of the Administration but his boat was not a merchant vessel of the United States, the Clarification Act of March 24, 1943, was made retroactive to October 1, 1941. Probably other compensation for injuries may have existed prior to the enactment of this Act.” (p. 744)

Mr. Justice Reed thought that the majority misconceived the effect of the Brady case. He took the view, as we had, that it did no more than to hold that actions could be maintained against agents of the United States at common law for the agent's own torts, and that a denial of Hust's right to sue the agent under the Jones Act did not restore the rule of the Lustgarten case. “We do not think the requirement that seamen, employees of the United States, must seek their remedy against their employer under the Suits in Admiralty Act has any relation to the Lustgarten or Brady cases.” (p. 745) There was nothing to prevent Hust from suing the agent for its own tort, but he could not “hold respondent liable as employer for negligence [fol. 37] of petitioner's fellow servants, of petitioner's superiors or the Master under the Merchant Marine Act.” (p. 747)

" \* \* \* There is here no 'disruption' of the normal and past relationship between seaman and employer. This Court errs, we think, in suggesting any seaman has been deprived of any right by the Clarification Act of 1943 under the construction of the Oregon Supreme Court. No seaman ever had a right of recovery under the Merchant Marine Act except against his employer. That the seaman still has. . .

"What the Clarification Act does and what it obviously was intended to do \* \* \* was to continue the policy of requiring seamen who were employees of the United States to continue to vindicate those rights through the Suits in Admiralty Act." (p. 748)

The minority took issue with the *pro hac vice* theory, saying:

" \* \* \* But a charterer or owner *pro hac vice*, who is also an employer, is one who takes over 'the exclusive possession, command, and navigation of the vessel.' *Reed v. United States*, 11 Wall. 591, 600. That is a bareboat charter. Under the contract in this case, the respondent had no such authority. As we have pointed out above, and as the contract shows, he acted for the United States under its command and then only in certain matters not connected with actual navigation." (p. 747)

In the light of the foregoing analysis of the opinions in the *Hust* case, we will consider first the defendant's contention that that case has been overruled by *Caldarola v. Eckert*, *supra*. The Plaintiff there was not a seaman but a longshoreman. He was not an employee of the defendants, the General Agents. The following statement of the facts is taken from the opinion of the court:

"The S. S. *Everagra* is owned by the United States and managed in its behalf by the respondents as General Agents. On January 27, 1944, the *Everagra*, docked in the North River, New York City, was being unloaded by a stevedoring concern, the *Jarka Company*. *Jarka* did the unloading under a contract with the United States, negotiated through the War Ship-  
[fol. 38] ping Administration. One of its provisions was that 'the Administrator shall furnish and main-



tion in good working order all' necessary equipment. Caldarola, the petitioner, was an employee of Jarka. In the course of his work on the vessel he was injured. He brought this action in the New York courts against the respondents, claiming that his injury was caused by a defective boom and that they were liable for failing in their duty as agents to maintain it in sound condition."

The Supreme Court of the United States affirmed a judgment of the Court of Appeals of New York in favor of the agents. Under New York law liability in tort by the agents for Caldarola's injury would only arise where there is possession and control of premises on which injury occurs due to negligence in their maintenance. Hence, it became necessary to examine the terms of the General Service Agreement to determine as a question of federal law whether, on a fair reading of the contract, the agents were in possession and control of the S. S. Everagra. As to this the court said:

" \* \* \* The United States, as *amicus curiae*, submitted what we deem to be conclusive considerations against reading the contract so as to find the Agents to be owners *pro hac vice* in possession and control of the vessel. The consequences, to both the national and international interests of the United States, of such a construction would be too far-reaching to warrant such a forced reading merely in order to have a basis on which to build liability under the common law of New York. Serious issues affecting the immunity of government vessels in foreign ports as well as immunity from regulation and taxation by local governments would needlessly be raised. After all, the question is not whether petitioner may be compensated for his injury. Congress has made provision for that. Petitioner insists, in order to enable him to sue in the courts of New York, that the Agents are to be deemed, as a matter of federal law, owners of the vessel *pro hac vice* and, therefore, as a matter of state law, subject to the duties of such ownership under New York law toward business invitees. We reject this construction."

[fol. 39] The opinion then continues:

"Our previous decisions do not require it. *Hust vs. Moore-McCormack Lines*, supra, arose under the Jones Act (Act of March 4, 1915, 38 Stat. 1185, as amended, June 5, 1920, 41 Stat. 1007). We there held that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer.' The court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States.

"*Brady vs. Roosevelt Steamship Co.*, 317 U. S. 575, 1943 A. M. C. 1, is likewise remote from the issues decisive of this case. It merely held that the Suits in Admiralty Act, by furnishing an *in personam* remedy against the United States, did not free the Agent from liability for his own torts. The Brady case did not reach the 'different question' whether 'a cause of action' against the Agent had been established. 317 U. S. at 585. That is the precise question here, and more particularly, whether the contract created a relationship from which, under New York law, liability as to business invitees followed."

The opinion of the court was written by Mr. Justice Frankfurter and concurred in by the Chief Justice and Justices Reed, Jackson and Burton. Thus, the three justices who dissented in the *Hust* case became a part of the majority of the full court which decided the *Caldarola* case, while the four justices who constituted the majority in the *Hust* case all dissented on grounds which, to a large extent, formed the basis of the prevailing opinions in the *Hust* case. They took emphatic issue with the majority's interpretation of the *Brady* case.

We are urged to declare that this decision overrules the *Hust* case because, contrary to what the majority of the seven-judge court then held, it determines, first, that, under [fol. 40] the General Service Agreement, agents are not owners *pro hac vice* of Government vessels, and, second,

that the Brady case merely held that the Suits in Admiralty Act did not free the agent from liability for his own torts.

Great stress was laid on the Brady decision in both reversing opinions in the Hust case, while the *pro hac vice* doctrine was the principal ground on which Mr. Justice Douglas thought that liability of the agent should be sustained. But we cannot say that the Hust case has been overruled because it has now been determined that a majority of a seven-member court misconceived the effects of the Brady decision, and that two justices erroneously thought that the agent was in possession and control of the vessel. All we can say is that two of the props of the Hust decision have been removed. The Supreme Court of the United States did not avail itself of the opportunity offered it to overrule its prior decision, but distinguished it.

While the basis on which the majority sustained liability in the Hust case is not clear to us, it was made sufficiently clear that the question was not governed by common law principles. With no statement by the court which rendered the decision that that view has been abandoned, it would be presumption on our part, under the circumstances, to say that the decision has been overruled.

Closely allied to the foregoing contention is the argument pressed upon us in the brief of the United States in substance as follows: By the Caldarola case it is established that the agent is not the owner *pro hac vice* of the vessel, and does not possess, operate or control it. The general rule of law is that the employer is not liable for the negligent acts of his employee unless at the very time that the act is committed the latter is engaged in the service of the [fol. 41] former. If he is not, and the employee at that time is performing services for someone else, than that other, not the general employer, is responsible for the consequences of the employee's negligent conduct. *Denton v. Yazoo & M. V. R. Co.*, 284 U. S. 305, 76 L. ed. 480, 29 S. Ct. 252. And the question as to whose work is being performed is usually answered, as stated in the Anderson case, "by ascertaining who has the power to control and direct the servants in the performance of that work." Conceding that, generally, for the purposes of the Jones Act, as the Hust case seems to hold, the master and crew of the S. S. George Davidson were employees of Shepard Steamship Company, still, at the time of the injury to Fink, they were not performing services for the defendant, but for the United States, which,

through the War Shipping Administration, was operating the vessel and was in the exclusive possession and control of it.\*

The legal principles relied on in the Government's brief are well settled. They have the sanction of the Supreme Court of the United States. In the Anderson case the court said regarding the reason of the rule of a master's liability for the negligence of his servant:

" \* \* \* In substance, it is that the master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant, in his negligent conduct, represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. \* \* \* The master's responsibility cannot be extended beyond the limits of the [fol. 42] master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it."

The Supreme Court applied these rules to the United States in the Yazoo case when it held that the railroad was not responsible for the negligence of a porter whom it employed and paid, but who, at the time the negligent act was committed, was engaged in loading United States mail into a mail car under the direction of a United States postal transfer clerk. This is the so-called lent servant doctrine.

As further support for its position the Government's brief calls attention to the provisions of Article 3A (d) of the General Service Agreement set out in the margin.\* It

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\* The converse of this proposition is stated by the Circuit Court of Appeals for the 2d Circuit in *Militano v. United States*, 156 F. (2d) 599, which was decided after *Hust* and before *Caldarola*, and involved facts like those in the latter case. In sustaining liability of the agent the court said: "If the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act, we think it cannot escape the duties of an owner *pro hac vice* in other respects."

\* "The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee



is said to be the well-settled rule that the agent procuring the employment of others in such a manner is not responsible for the torts of such employees, and counsel for the Government cite sec. 79, Comment (a), Restatement, Agency, which reads:

“ . . . The agents so employed are the agents of the principal and not of the employing agent, who is not responsible to them for their compensation unless he so manifests, and is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal, unless he is negligent in their selection.”

[fol. 43] However convincing these arguments might be in other circumstances, we think that they could be more appropriately and perhaps more effectively addressed to the Supreme Court of the United States. For, in the opinion of Mr. Justice Rutledge in the *Hust* case, the test of ultimate control over the seaman in the performance of his work, which this court thought was the determining factor, was rejected. It was said to be a “fallacy” to assume that “the case would be controlled by the common law rules of private agency” (328 U.S. 724). And the very section of the Restatement of Agency upon which counsel rely was cited by this court in support of its conclusion that the agent was not responsible for the negligence of the master, the boatswain, or other seamen on the vessel (176 Or. 696). The Supreme Court of the United States, however, did not

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of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.”

mention the rule of the Restatement and obviously considered it to be without bearing on the question.

But it is argued by the Government that the instant case is to be distinguished from the *Hust* case for two reasons, first, because of an "admission" in the answer in the *Hust* case that the defendant "operated" the vessel, and, second, because the *Hust* case did no more than decide that the injured seaman was free to bring his action under the Jones Act and did not hold that the agent was vicariously responsible for the tortious acts of the master or boatswain, which is the negligence alleged here. We cannot agree. The admission in the answer in the *Hust* case was construed by this court to go "no further than to admit operation of the vessel to the extent authorized by the agreement and to the exclusion of any control of the vessel or authority over the crew" (176 Or. 696). The alleged admission was not referred to in any of the opinions of the Supreme Court of the United States, and we can find nothing in the prevailing opinions which would indicate that it was relied on as [fol. 44] a basis for decision. The other claimed point of difference does not exist, for the negligence in the *Hust* case was of precisely the same character as that alleged here, namely, the negligence of the master, the boatswain, and perhaps other members of the crew (176 Or. 695). The Supreme Court of the United States so treated the case. The problem was one of vicarious responsibility (328 U. S. 712, 713, 724).\*

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\* It is said in the Government's brief: "For reasons not susceptible of precise analysis the Rutledge opinion concluded that suit under the Jones Act was available to plaintiff and the cause was remanded for further proceedings (328 U. S. at 734)." To the foregoing the following footnote is appended: "Settlement was subsequently authorized by the United States without the case being returned to the Supreme Court. Accordingly, it was not until *Caldarola* that it was known that the new five judge majority regarded the opinion of the old four judge majority as turning on the concession that Moore-McCormack was *operating* the vessel." On the remand of the *Hust* case two questions were presented by Moore-McCormack: (1) That the Supreme Court decision *did* not determine the question of the agent's liability; (2) that the verdict was excessive. We held adversely to Moore-McCormack on the first ques-

Furthermore, no distinction can be validly drawn between this and the *Hust* case based upon the functions actually performed by the agents. In the latter case there was a claim that the evidence showed *de facto* control of the vessel. We held against that contention, and the majority opinion of the Supreme Court of the United States does not take issue with our conclusion. Here the case against *de facto* control is, if anything stronger. Not only is it shown that the agent was limited to the performance of certain shoreside functions not connected with the navigation of the vessel and in large part subject to supervision of the War Shipping Administration, but some of the duties performed [fol. 45] by Moore-McCormack in the *Hust* case were not performed by Shepard in this case but by American President Lines, appointed berth agent, which performed "port-services", consisting principally of arranging for the handling and loading of cargo. Nor can we agree with the finding of the learned circuit judge, who heard the case below, that the evidence shows that Shepard had the power of discharging the seamen. The evidence on this point is to the effect that when agents discharged seamen they did so on behalf of the War Shipping Administration as principal, and there is no evidence that Shepard ever discharged any seaman.

The present case, therefore, is as stated in the beginning of this opinion, in all its essential aspects identical with the *Hust* case, with the single exception that Fink was injured after the Clarification Act was passed. The effect to be given to that act remains to be considered.

As previously stated, the Supreme Court of the United States, in the *Hust* decision, expressly left open the question whether the Clarification Act, in its application to claims arising after the act became effective, deprived seamen of the right to sue the General Agent under the Jones Act as their employer, and there is no binding declaration of that court on that subject. What this court said in the *Hust* case about the meaning and effect of section 1 of the Act did not

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tion and sent the second question to the Circuit Court for decision. *Hust v. Moore-McCormack Lines, Inc.*, — Or. —, 177 P. (2d) 429. There is not a word in the Caldarella opinion that even remotely suggests that the five-judge majority in that case thought that the decision in the *Hust* case turned on the "concession."

bear on the question now presented, since we were of the opinion that, irrespective of the Act and because of the terms of the General Service Agreement, the General Agent was not the seamen's employer, and, hence, the right in question had never existed.

[fol. 46] As shown by the Committee reports, excerpts from which are printed at the end of this opinion, the Administrator of the War Shipping Administration was desirous of maintaining the peace-time status of seamen so far as certain rights which they had long enjoyed were concerned, among others, their rights to compensation for death and injuries and to earn credits for Social Security benefits. The Administrator had not been able to carry out this policy in its entirety, because seamen employed on Government vessels were technically employees of the United States. As such, they did not have all the rights enjoyed by seamen privately employed. A seaman could not, for example, sue the United States for injury under the Suits in Admiralty Act, if the vessel on which he happened to be employed was a public vessel, and, moreover, it was difficult at times to determine whether it was a merchant or a public vessel.\* "If they were private employees, right to redress for death, injury, or illness could be prosecuted under the Jones Act, and the General maritime law." S. R. No. 62, 78th Cong., 1st Sess., 5. As Government employees, they probably had rights under the United States Compensation Act not enjoyed by seamen under private employment, but "vital differences in these rights are made to depend upon whether the seaman happens to be employed aboard a vessel time-chartered to the War Shipping Administration or owned by or bareboat-chartered to the War Shipping Administration. Since seamen constantly change from one vessel to another, their rights for death, injury, or illness also constantly change, depending upon the relationship of the War Shipping Administration to the [fol. 47] vessel." *Idem*. The bill was designed to remove this confusion and these inequities. It did not affect "seamen employed on vessels time-chartered to the War

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\* Recovery for death on a public vessel has since been sustained under the Public Vessels Act of 1925, 46 U. S. C., sec. 781 *et seq.* *United States v. Lauro*, reported *sub nom.* *American Stevedores, Inc. v. Porello*, 330 U. S. 446, 458-460, 67 S. Ct. 847, 91 L. ed. — (March 10, 1947).



Shipping Administration where the vessels are supplied with crews employed by the company from which the vessel was chartered. As to them, their status and the status of the government employees mentioned will be made uniform." *Idem.*

The same uniformity of status between Government employed and privately employed seamen was proposed to be achieved with respect to the Civil Service Retirement Act and the Social Security Act.

To accomplish the purposes mentioned, section 1 of the Clarification Act was adopted. It reads as follows:

"Sec. 1. That (a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign-flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or reparation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions and privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.

"Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act entitled 'An Act to provide benefits for the injury, disability, death, or detention, of employees of contractors with the United States and certain other persons or reimbursement therefor', approved December 2, 1942 (Public Law 784, Seventy-seventh Congress).

[fol. 48] "Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seamen were employed on a privately owned and operated American vessel.

"Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act.

"Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration.

"Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended.

"When used in this subsection the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms 'War Shipping Administration' and 'Administrator, War Shipping Administration' shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term 'seaman' shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States."

The section may be paraphrased as follows: As to certain rights, seamen employed by the United States on Government vessels shall not be deemed employees of the United States; as to certain other rights, including the right to recover for death and injuries, such seamen shall have [fol. 49] the same status as seamen privately employed. The remedy in the latter class of cases shall be by suit against the United States under the Suits in Admiralty Act, after the claim shall have been administratively disallowed.

The question is whether Congress intended that this should be the exclusive remedy. We think that it must be so held. This was a comprehensive enactment intended to define the rights and remedies of seamen employed on United States vessels for the period of the war. It speaks in no uncertain terms of the intention of Congress to treat such seamen as employees of the United States, while according them the same *rights* they would have had in private employment, though not the same *remedies*. Although General Agents are not mentioned, the context of the section, as well as the legislative history, excludes the notion that they were to be regarded as employers of such seamen and liable to suit as such for the causes mentioned. Had that been in the mind of Congress, there would have been no reason for the provision regarding claims for injury and death, since, as employees of the General Agent, the seamen, without any additional legislation whatever, would have had the right to sue the agent under the Jones Act, with the right to a jury trial. It would have been wholly unnecessary to accord to seamen in private employment the rights of seamen in private employment.

The act draws a clear distinction between substantive rights and the procedure for enforcing those rights. As to [fol. 50] this it is said in *Gaynor v. Agwilines, Inc.*, (U. S. D. C. E. D. Pa.) 1948 A. M. C. 81, supplemental opinion, January 1, 1948, not reported:

“ \* \* \* Merely because Congress stated that with respect to those rights listed in clauses (2) and (3) of section 1 (a) the seamen employed by the War Shipping Administration shall ‘have all the rights, benefits, exemptions, privileges and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels’, it does not follow that Congress meant that they shall have the same remedies. Congress was not haphazard, but careful in the use of terms. The omission of the word ‘remedies’ was not accidental but intentional.”

This whole controversy is over the right to a jury trial in this class of cases. Yet the legislative history demonstrates conclusively that Congress, for reasons which to it seemed sufficient, determined to withhold that right from Govern-

ment-employed seamen for the duration of the war. The question arose at an early stage in the consideration of the Clarification Act, when a representative of the National [fol. 51] Maritime Union appeared before the House Committee on the Merchant Marine and Fisheries, and stated that "unfortunately" the bill provided that claims for death, injury, and so forth, should be enforced pursuant to the Suits in Admiralty Act, and requested that section 1 be amended by allowing the claimant at his election to "maintain an action for damages at law, with the right of a trial by jury." Hearings on H. R. No. 7424, 77th Cong., 2 Sess., 31. In the same report (p. 33) appears a letter of the Attorney General under date of September 14, 1942, in which he lists three reasons why Congress might deem it inadvisable to allow jury trials in such cases. These are: First, that "it has been found that in the course of admiralty litigation information is made available to the enemy detrimental to the national safety and detrimental to the lives and safety of seamen." To prevent this an amendment to Admiralty Rule 46, which would permit such trials to be held *in camera* and the records in the proceedings to be impounded, had been adopted. But it would be difficult to make such a provision effective in jury trials. Second Congress has rarely allowed jury trials in suits against the United States. Third, the cases will have to be tried largely on depositions, and judges are better qualified than juries to appraise evidence given in that form.

Congress, as the reports show, governed its action on this point by the advice of the Attorney General, and provided that the claims in question *shall* be prosecuted under the Suits in Admiralty Act. See H. R. No. 2572, 77th Cong., 2d Sess., 14; S. R. No. 1655, 77th Cong., 2d Sess., 24; H. R. No. 107, 78th Cong., 1st Sess., 21.

The decision not to allow a jury trial in this class of cases is thus referred to in the Committee reports:

[fol. 52] "Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act." H. R. No. 2572, 77th Cong., 2d Sess., 14; S. R. No. 62, 78th Cong., 1st Sess., 11; S. R. No. 1655, 77th Cong., 2d Sess., 3; H. R. No. 107, 78th Cong., 1st Sess., 21.



The modification referred to is not an enlargement but a curtailment of rights. There could have been no such curtailment if seamen were to continue to enjoy the right to sue the General Agent at law under the Jones Act.

But, it is argued, Congress either did not know or was in doubt whether seamen on vessels of the United States were employees of the General Agent with the usual rights of such employees, and, not having specifically or expressly legislated against the continued exercise of such rights, the intention to do so cannot be implied, under the rule that there must be an unequivocal expression of an intention to disturb settled rights before the courts will declare that such rights have been taken away. *Hust v. Moor-McCormack Lines*, supra (328 U. S. 707, 722); *Brady v. Roosevelt S. S. Company*, supra (317 U. S., at p. 580).

We will not speculate on what Congress knew or thought in this regard. As stated, there is no mention of agents in section 1 of the Clarification Act. There is no mention in the Committee reports of the possible liability of agents as employers of seamen on United States vessels, employed by the United States through the War Shipping Administration. There are several references to "an independent liability (of agents) in certain cases," as determined in [fol. 53] the Brady case. S. R. No. 62, 78th Cong., 1st Sess., 8, 17; H. R. No. 107, 78th Cong., 1st Sess., 5, 29; but the Brady case did not deal with the question of the liability of an agent as an employer of seamen.\*

There is also mention in the reports of the use by the War Shipping Administration of the services of private steamship companies in connection with the operation of the merchant fleet, and of certain of the provisions of the General Service Agreement under which the agents acted. S. R. No. 62, 78th Cong., 1st Sess., 4.

But whatever Congress may have thought as to the possibility of a holding that the seamen in question were em-

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\* In the opinion of Mr. Justice Rutledge in the *Hust* case (328 U. S. 729) a footnote says of the Committee References: "These reports construe the effects of the Brady decision more narrowly than we have done in this case and than the decision justifies." The committee's construction, however, would seem to be in harmony with the view of the effects of the Brady decision expressed by the majority in the *Caldarola* case.

ployees of the agents, as well as of the United States, the intention to declare definitively the rights and remedies of such seamen is manifest in the first section of the Clarification Act. The purpose of Congress is emphasized by the retroactive provision of section 1, which deals with claims or causes of action arising after October 1, 1941, and before the act became effective, and provides that such claims may be enforced "and at the election of the seaman . . . shall be governed, as if this section had been in effect," when such cause of action accrued. The Hust case holds that the election thus provided for was available to Hust, since his cause of action arose before the Act became effective. That is, he could either have sued the United States pursuant to the provisions of the Suits in Admiralty Act, or he could maintain his action against the agent under the [fol. 54] Jones Act. No such election is given as to after-accruing claims, and none, we think, can be implied.

This conclusion is in accord with that reached by Judge Ganey of the District Court of the United States for the Eastern District of Pennsylvania in *Gaynor v. Agwilines, Inc.*, supra, and to some extent is supported by *Shilman v. United States*, (C. C. A. 2d) 1948 A. M. C. 19. The *Gaynor* case was a civil action against the General Agent for wages, maintenance, and cure, and for loss of personal effects. Like claims for death and personal injuries, such claims, under the Clarification Act, Sec. 1 (a), clauses (2) and (3) "shall . . . be enforced pursuant to the provisions of the Suits in Admiralty Act." The court held that the plaintiff's exclusive remedy was against the United States under that Act. The *Hust* case was distinguished, because it arose before the effective date of the Clarification Act. The *Shilman* case was a libel in admiralty against the United States and the General Agent, to recover wages. The court, in an opinion by Judge Augustus Hand, held that the seaman was entitled to recover from the United States, citing Sec. 1 (a), clause (3), of the Clarification Act, but not from the General Agent, because the claim "arose out of a contract of employment by the United States as a disclosed principal and therefore may not be asserted against its agent." Referring to the *Hust* and *Caldarola* cases, the court said: "In each case the court was highly divided but in neither did it decide that the agent was so far the employer as to be liable to the seamen for their wages or other contractual obligations."

Plaintiff has cited *Aird v. Weyerhaeuser Steamship Company*, (C. C. A. 3d) 1947 A. M. C. 1503, and *Cohen v. American Petroleum Transport Corp.*, (City Court of the City of New York) 1947 A. M. C. 336. In the former case, which was a libel *in personam*, *Aird*, a seaman, was permitted to recover wages against the agent. The case is distinguishable, because the claim arose before the Clarification Act. We are advised that a rehearing has been granted and that no final decision has yet been rendered. The *Cohen* decision sustained a seaman's right to recover from the agent for personal injuries under the Jones Act. Its value as authority is weakened by partial reliance on *Militano v. United States*, *supra* (156 F. (2d) 599), which, on the authority of the *Hust* case, held the General Agent owner of the vessel *pro hac vice*, but has since in effect been overruled by the *Caldarola* decision. For the reasons heretofore given, we are unable to agree with the New York court's view that the Clarification Act does not affect seamen's rights to sue the agents as their employers.

The case has been ably presented on both sides and in the brief of the Government, and counsel have made available to the court a mass of material which has received our consideration and has aided in the solution of the problem.

The Government, in its brief, takes the position that the Clarification Act "has no bearing on the present case". This would be true if, as the Government contends, the *Hust* case has been overruled or does not stand for agent liability in a case like this. Not being able to agree with these contentions, it has become necessary for us to interpret the Act. In the view we have taken of the meaning and effect of that legislation, it was error for the Circuit Court to rule adversely to the defendant upon the various motions by which it raised the question of its liability.

As this disposes of the case, there is no need to discuss other assignments of error in defendant's brief.

[fol. 56] The judgment is reversed and the cause remanded to the Circuit Court with directions to enter judgment — the defendant.

Belt, J., dissents.

*"Problems arising out of Government employee status of seamen.*—Various difficulties have arisen with respect to the benefits and remedies for seamen employed by, or on behalf of, the War Shipping Administration on vessels

owned or bare-boat chartered by it. These questions arise because of a technical status of such seamen as employees of the United States by virtue of their employment through the War Shipping Administration for service on such vessels.

"Because of this fact that Administrator has not been able under existing law to carry out entirely his intended policy of maintaining the peacetime status of seamen insofar as seamen's rights to compensation for injuries, and so forth, wage credits toward social-security benefits, and various other benefits which seamen have enjoyed and to which they are entitled. The purpose of section 1 of the bill is to correct the situation so as to permit the complete extension into this area of the basic policy of maintaining the private status of merchant seamen for the duration of the war.

"Seamen employed as Government employees on vessels owned by, or bareboat-chartered to, the War Shipping Administration are sometimes precluded from enforcing against the United States the rights and benefits in case of death, injury, illness, detention, and so on that would be available to them if employed by private employers, except under the Suits in Admiralty Act. If they were private employees, rights to redress for death, injury, or illness could be prosecuted under the Jones Act and the general maritime law. These same rights may be asserted against the United States as the employer under the Suits in Admiralty Act providing the vessel involved is a merchant vessel. In case of public vessels the seaman must rely for compensation upon the Administrator's policy recognizing contractual liability which this legislation recognizes. Present-day operating conditions often make uncertain in some cases whether the vessel is a merchant or a public vessel. As a consequence, even though the vessels are generally merchant vessels and not public vessels, there are some cases in which the aforementioned rights of such seamen are in doubt. In addition to these rights which, at times, are [fol. 57] uncertain for the reasons mentioned, the seamen who are employees of the United States probably have rights under the United States Employees' Compensation Act in the event of injury or death. Such compensation benefits are not presently enjoyed by seamen under private employment. Thus vital differences in these rights are



made to depend upon whether the seaman happens to be employed aboard a vessel time-chartered to the War Shipping Administration or owned by or bareboat-chartered to the War Shipping Administration. Since seamen constantly change from one vessel to another, their rights for death, injury, or illness also constantly change, depending upon the relationship of the War Shipping Administration to the vessel. This fluctuation and lack of uniformity of rights leads to dependency of vital rights upon chance with a result of confusion and inequities. The bill does not affect seamen employed on vessels time-chartered. As to them their status and the status of the Government employees mentioned will be made uniform.

"Furthermore, these seamen who are Government employees are theoretically subject to the Civil Service Retirement Act, yet they are actually exempt for the time being because of an Executive order excluding employees engaged in certain types of services. Employees of private companies earn credits toward benefits of the old-age and survivors' insurance provisions of the Social Security Act. Under the present laws seamen who are government employees through employment by the War Shipping Administration do not have rights under either the Civil Service Retirement Act nor is their employment covered by the Social Security Act." S. R. No. 62, 78th Cong., 1st Sess., 5. See H. R. No. 2572, 77th Cong., 2d Sess., 8; H. R. No. 107, 78th Cong., 1st Sess., 15; H. R. No. 1655, 2d Sess., 18; H. R. No. 7424, 77th Cong., 2d Sess., 14.

"The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942)." H. R. No. 2572, 77th Cong., 2d Sess., 14. See, H. R. No. 107,

78th Cong., 1st Sess., 21; S. R. No. 1655, 77th Cong., 2d Sess., 3.

[fol. 58]

IN SUPREME COURT OF OREGON

FRED W. FINK, Respondent,

v.

SHEPARD STEAMSHIP COMPANY, a corporation, Appellant

Appeal from Multnomah County

JUDGMENT—April 6, 1948

This cause on March 4, 1948, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

It is therefore considered, ordered and adjudged that the judgment of the court below in this cause rendered and entered be and the same is in all things reversed and set aside.

It is further ordered that appellant recover of and from respondent its costs and disbursements in this court taxed at \$605.50.

It is further ordered that this cause be remanded to the court below from which the appeal was taken with directions to enter a judgment for defendant and in accordance herewith.

[fol. 59]

[File endorsement omitted]

IN THE SUPREME COURT OF OREGON

[Title omitted]

PETITION FOR REHEARING—Filed May 14, 1948

To the Honorable Supreme Court of the State of Oregon and the Judges Thereof:

Comes now Fred W. Fink, Respondent in the above entitled cause, through his attorneys, Green, Landye & Peter-

son and Hicks, Davis & Tongue, and respectfully petitions for a rehearing of said cause for the reasons and upon the grounds following, to-wit:

## I

In holding that under the Clarification Act, 50 U.S.C.A. App. sec. 1291, the exclusive remedy of injured seamen employed on vessels owned by the United States and operated under standard General Agency Agreements is to sue the United States under the Suits in Admiralty Act, it necessarily follows that all of the former rights of such seamen to sue the general agents in the state courts under the Jones Act, 46 U.S.C.A. sec. 688, with the right of trial by jury, have been destroyed by virtue of the Clarification Act. In so holding, this Court has failed to follow the rule established by the Supreme Court of the United States in *Brady v. Roosevelt Steamship Co.*, 317 U. S. 575 and in *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, that although "Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command . . . it is not permissible to find one by implication."

## II

Before such a clear intent can be found to provide an exclusive remedy against the United States and to destroy such rights, it must at least be clear that Congress understood that at the time of enacting the Clarification Act [fol. 60] seamen employed on such vessels had theretofore become employees of the United States, since if Congress understood that such seamen were still employees of the general agents or was in doubt as to whether such seamen were employees of the United States or of the general agents, it would have been necessary to amend or repeal the Jones Act before the rights of such employees to sue the general agents would have been destroyed and in the absence of such amendment or repeal the provision of rights against the United States must be considered as an *additional* remedy, not an exclusive remedy, since rights under the Jones Act cannot be destroyed by implication.

## III

The Supreme Court of the United States in the *Hust* case has expressly held that such seamen are employees of the

general agents for the purposes of the Jones Act, as confirmed in *Caldarola v. Eckart*, 332 U. S. 155; that Congress was at least uncertain as to the status of such seamen (op. p. 730); that one of the purposes of the Clarification Act was to save seamen's rights rather than to take them away (op. p. 726) and that the Act was passed only "to make certain that seamen would have at least the remedy provided by the Suits in Admiralty Act" (op. p. 727). These pronouncements are binding on this Court and foreclose any holding that in adopting that Act Congress expressed any "clear and unequivocal command" to destroy injured seamen's rights under the Jones Act to sue the general agents.

#### IV

Far from having any such far-reaching intent, the Clarification Act, as conceded by the very administrative agency which drafted the legislation and sponsored its passage, was limited to the rights of such seamen against the government, did nothing to affect any rights or remedies that they might have had against the general agents and, therefore, "has no bearing on the present case." (Gov. Br. p. 51)

#### V

The retroactive provisions of the Clarification Act pro-[fol. 61] viding for an election of remedies prior to the effective date of that Act, instead of showing an intent to limit seamen to suits under the Jones Act after the effective date of the Clarification Act, reveals no more than an intent to extend retroactively the remedy of such seamen under the Suits in Admiralty Act, in accord with the "conserving intent of Congress", as held in the *Hust* case, and, at the least, cannot be regarded as any indication of a "clear and unequivocal command" to destroy the rights of seamen under the Jones Act against the general agents.

#### VI

The decision of this Court represents but another attempt to resurrect the doctrine of the *Lustgarten* case, *Johnson v. Fleet Corp.*, 317 U. S. 575, limiting the remedy of such seamen to Suits in Admiralty against the government—a doctrine first rejected in *Brady v. Roosevelt Steamship Co.*, supra, and again rejected in *Hust v. Moore-McCormack*.



*Lines*, supra, in reversing the decision of this court in that case.

## VII

Since the submission of this case for decision respondent has been informed of additional decisions by other courts which add to the weight of authority in support of the proposition that, despite the Clarification Act, such seamen retain the right to sue the general agents, as held by the learned trial judge in this case. These decisions, copies of which are attached hereto marked as Exhibits A and B, include a decision by Hon. Alfred C. Coxe, a United States District Judge for the Southern District of New York, in *Casey v. American Export Lines*, and a decision by Hon. Harold R. Medina, a United States District Judge of national recognition for the same district, in *Warren v. United States of America and American South African Lines, Inc.*, 1948 A.M.C. 568.

Wherefore, upon the foregoing grounds, it is respectfully submitted that this petition for rehearing be granted and [fol. 62] that the judgment of the Circuit Court of the State of Oregon for Multnomah County be, upon further consideration, affirmed.

Respectfully submitted, Green, Landye & Peterson,  
Hicks, Davis & Tongue.

### [fol. 63] EXHIBIT "A" TO PETITION FOR REHEARING

"I think this case is ruled by the *Hust* case, 328 U. S. 707 despite the fact that the injury which resulted in the death of the deceased occurred subsequent to the effective date of the Clarification Act on March 24, 1943. See *Cohen v. American Petroleum Corp.* 1947 A.M.C. 336.

The motion of the defendant to dismiss the action for lack of jurisdiction is denied."

: Alfred C. Coxe, U.S.D.J.

Dec. 17, 1947.

[fol. 64] EXHIBIT "B" TO PETITION FOR REHEARING

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF  
NEW YORK

WALTER K. WARREN, Libellant,

against

UNITED STATES OF AMERICA as Owner of the Steamship  
"Anna Howard Shaw," and American South African  
Line, Inc., as Operator of the Steamship "Anna Howard  
Shaw", Respondents

### OPINION

MEDINA, D.:J.:

In *Shilman vs. United States of America and Grace Line, Inc.*, decided December 4, 1947, the C.C.A. did not decide that a seaman may not recover maintenance and cure against a steamship company acting under a General Agency Agreement. The contention that the C.C.A. would so hold, should such a case come before it, is based upon the statement at the end of the opinion that neither in the *Hust* case nor the *Caldarola* case was it held that the agent was an employer to such an extent as to give rise to liability for wages "or other contractual obligations." The subject is a prickly one. The right to maintenance and cure traces its origin to a time when such things as "contractual obligations" in the modern sense of the term could scarcely be said to exist. The right is inherent in the status of the seaman. It is by no means clear that a right to maintenance and cure may not arise even prior to the signing of shipping articles, comment, *The Tangled Seine*. A survey of Maritime Personal Injuries Remedies, 57 Yale Law Journal, 243, 248, n. 19 (1947) citing *Martinez vs. Marine Transport* [fol. 65] Line 1947 A.M.C. 529 (N.Y.C. Mun. Ct.) rev'd on other grounds 119 N.Y.L.J. 787 Sup. Ct. App. Term 3/2/48; and a scrutiny of the long interesting history of this curious remedy of the maritime law would seem to lead to the conclusion that it partakes as much of the character of tort as contract and perhaps hangs suspended as it were between the two. In any event, my holding that American South African Line is the libellant's employer for the purposes of a claim for maintenance and cure stems from the *Hust* case. With each new reading of the opinion

of the Courts I am the more convinced that the reasoning behind that decision applies just as forcibly to maintenance and ~~and~~ as to the remedy provided by the Jones Act. While the Hurst case stands it seems to me I have no alternative than to stick to my guns.

Respondent, American South African Lines, now urges for the first time that the Clarification Act is a bar to libellant's recovery. But the weight of authority and the weight of reasoning to the Clarification Act will not bear the construction which respondents would give it with respect to rights arising after the date it took effect. Bennett vs. Wilmore 69 F. Supp. 427, Moss vs. Alaska 1945 A.M.C. 493, Gay vs. Pope & Talbot 47 N.Y.S. (2) 16, Cohen vs. American Petroleum 1947 A.M.C. 336, Fink vs. Shepard 1946 A.M.C. 1333.

Contra:—

Gaynor vs. Agwilines 1948 A.M.C. 81, U.S. vs. Tubinski 153 F 2nd 1013.

Motion denied 3/4/48.

[fol. 66] IN THE SUPREME COURT OF OREGON

FRED W. FINK, Respondent,

v.

SHEPARD STEAMSHIP COMPANY, a Corporation, Appellant

Appeal from Circuit Court, Multnomah County

Walter L. Tooze, Judge

Submitted on petition for rehearing filed May 14, 1948

Original opinion filed February 6, 1948.

Green, Landye & Peterson and Hicks, Davis & Tongue  
for Petitioner.

Wood, Matthiessen & Wood, contra.

Before Rossman, Chief Justice, and Lusk, Belt, Kelly,  
Bailey and Brand, Justices.

LUSK, J.

Petition denied.

## OPINION

[fol. 67] Lusk, J.

Plaintiff's petition for rehearing is based upon reasons heretofore advanced and all of which were considered in our opinion. Nothing new is presented except that attention is called to two decisions not previously cited: *Casey v. American Export Lines* (December 17, 1947, not reported), by Judge Alfred C. Coxe of the United States District Court for the Southern District of New York, and *Warren v. United States* (March 4, 1948) by Judge Harold R. Medina, of the same court, reported in 1948 A. M. C. 568. These eminent federal judges, passing upon the same question that was before us, have reached the opposite conclusion. They have not, however, seen fit to state the reasons which influenced them. Judge Coxe filed a memorandum consisting of one sentence. Judge Medina's answer to the claim that the Clarification Act barred a recovery against the agent for maintenance and cure is: "But by the weight of authority and the weight of reason to the Clarification Act will not bear the construction which respondent would give it with respect to rights arising after the date it took effect" (citing cases).

While we regret to find ourselves in disagreement with these decisions, we are not persuaded that the prestige of the judges who rendered them should, without more, cause us to abandon our previously announced views.

The petition for rehearing is, therefore, denied.

[fol. 68]

IN SUPREME COURT OF OREGON

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 18, 1948

The court having duly considered the Petition for Rehearing filed on behalf of respondent, and now being fully advised in the matter, it is hereby ordered that the same be denied.



[fol. 69]

## IN SUPREME COURT OF OREGON

## FIRST ASSIGNMENT OF ERROR

The Court erred in ruling that plaintiff was entitled to maintain an action against the defendant under the Jones Act in the Circuit Court; and in denying defendant's motion for a nonsuit; and in denying defendant's motion for a directed verdict; and in denying defendant's requested instruction for a directed verdict; and in denying defendant's motion for judgment notwithstanding the verdict.

These errors all rest upon the same ground, to-wit: That under Public Law 17, 78th Congress, 57 Stat. 45 Plaintiff was not entitled to sue defendant as his employer under the Jones Act in the State Court, but was confined to suit against the United States pursuant to the Suits in Admiralty Act.

[fol. 70]

[File endorsement omitted]

## IN THE SUPREME COURT OF OREGON

[Title omitted]

ORDER STAYING EXECUTION AND ENFORCEMENT OF JUDGMENT  
AND MANDATE—Filed July 16, 1948

Upon application of Fred W. Fink, plaintiff-respondent in the above entitled cause, by Thomas H. Tongue, III, one of his attorneys, for an order staying execution and enforcement of the judgment of the above entitled Court and cause to enable said petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and good cause therefor being shown; and petitioner having filed a good and sufficient undertaking, conditioned as required by law;

Now, Therefore, said undertaking in the amount of \_\_\_\_\_ is approved and it is ordered that the execution and enforcement of said judgment be and it is hereby stayed until the Supreme Court of the United States passes upon the petition to be made thereto in behalf of the plaintiff-respondent herein for a writ of certiorari and, if said petition be granted, until final disposition of said cause by the Supreme Court of the United States; provided that application for said writ is made to the Supreme Court of the

United States within three months from the 20th day of May, 1948, or within such additional time as may be granted by the Supreme Court of the United States for the filing of a petition for writ of certiorari therein.

Dated this 16<sup>th</sup> day of July, 1948.

(S.) George Rossman, Chief Justice.

[fol. 71a]

DEFENDANT'S EXHIBIT "E"

#### APPENDIX

The Correspondence Between the War Shipping Administration and the National Labor Relations Board

War Shipping Administration,  
Washington 25, D. C., October 20, 1942.

National Labor Relations Board,  
Washington, D. C.

GENTLEMEN:

As you know, one or two cases recently have arisen in which maritime labor unions have sought to invoke the jurisdiction of your Board under the National Labor Relations Act in matters involving either in whole or in part personnel employed on vessels owned by or under bareboat charter to the War Shipping Administration. Similar matters may arise in the future.

As you are undoubtedly aware, the War Shipping Administration, on April 8, 1942, requisitioned substantially all of the vessels in the American Merchant Marine with certain minor exceptions. These vessels are in addition to the substantial number of vessels constructed and owned by the government. The vessels requisitioned fall into two classes: (1) those requisitioned under bareboat charters which place the War Shipping Administration in substantially the same status as with respect to other vessels owned outright by the government, and (2) those requisitioned under time charters. All vessels owned or requisitioned under bareboat or time charter basis by the War Shipping Administration have been assigned to various steamship companies for operation under agency agreements. Those vessels owned by or bareboat chartered to the War Shipping

Administration are operated by steamship companies under what is known as a General Agency Agreement. Those vessels which are under time charter are operated by various steamship companies under what is known as a Time Charter Agency Agreement. While the charter and agency agreements of the nature mentioned are not uniform in all [fol. 71b] details, they are substantially the same with respect to the provisions governing the subjects discussed in this letter.

For your more complete information there is attached a copy each of our Requisition Bareboat Charter for Cargo and Tank Vessels, Requisition Time Charter for Dry Cargo Vessels, Requisition Time Charter for Tank Vessels, General Agency Agreement, (applicable to the operation of vessels owned by or bareboat chartered to the War Shipping Administration), and our Time Charter Agency Agreement (applicable to the operation of vessels under time charter to the War Shipping Administration).

It will be noted that under Clause 1 of Part II of both forms of time charters mentioned above, the owner is required to deliver the vessel to the charterer with a "Master and a full complement of officers and crew." Under Clause 6 it is provided that the owner shall provide and pay for "wages of . . . and other expenses pertaining to, the Master, officers and crew (except as herein otherwise provided)." It should also be noted that by virtue of Article 3A (c) of the Time Charter Agency Agreement the agent is required to provide and pay for various expenses "except those pertaining to the Master, officers and crew." Under the arrangement provided for by these time charter and time charter agency agreements, as illustrated by the aforementioned provisions, the Master officers and crew members of vessels time chartered to the War Shipping Administration are employees of the owner and not the charterer.

A different situation exists in regard to personnel employed aboard vessels owned by or bareboat chartered to the War Shipping Administration. In this connection we wish to call your attention to the provisions in Clause 14 of Part II of the Bareboat Charter for Cargo and Tank Vessels mentioned above which reads as follows:

During the period hereof, the Charterer shall at its own expense, or by its own procurement, man, victual,

navigate, operate, supply, fuel and repair the Vessel and pay all charges and expenses of every kind and nature whatsoever incident thereto. The Charterer and not the Owner shall have exclusive possession, control [fol 71c] and command of said Vessel during the entire period of this Charter.

It should also be noted that under Article I of the General Agency Agreement, under which vessels owned by or bareboat chartered to the War Shipping Administration are operated, the general agent acts as the agent of the United States and not as an independent contractor in the management and conducting of the business of the vessels assigned to it by the United States. The following provisions contained in Article III-A (d) are also called specifically to your attention:

\* \* \* The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. \* \* \* The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.

Under Article 7 provision is made for the reimbursement of the general agent by the United States for all crew expenditures, including disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, insurance premiums, payments under any applicable pension fund, Social Security Taxes, etc.

The War Shipping Administrator has been advised that under the contractual arrangements mentioned above and for other reasons, the Master, officers, and members of the crew of all vessels owned by or bareboat chartered to the War Shipping Administration are employees of the United States and particularly of the War Shipping Administration, and are so considered and treated at the present time



by other governmental departments and agencies for the purposes of the Civil Service Retirement Act, the United [fol. 71d] States Employees' Compensation Act, the Federal Social Security Laws, and the Federal Employment Tax laws. Furthermore, the wages of such personnel are exempt from attachment as government employees. The War Shipping Administrator has also been advised that Section 2 of the National Labor Relations Act provide that the term "employer" shall not include the United States.

Under these circumstances, the War Shipping Administration cannot take a position that the National Labor Relations Board has jurisdiction under the National Labor Relations Act of the personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration, and it is assumed that your Board, for like reasons, will not assert jurisdiction over these employees.

We are fully cognizant, however, of the services that your Board can render out of the abundance of your experience and trained staff in the solution of personnel problems which, except for the circumstances mentioned above, would ordinarily fall within the scope of the National Labor Relations Act. We are also generally advised of the satisfactory working arrangements which have been agreed upon between your Board and the War and Navy Departments under circumstances which, to some extent, may be analogous to those above described.

Enclosed for your further information is a copy of the Executive Order of the President dated February 7, 1942, establishing the War Shipping Administration. Paragraph 5 of the Executive Order reads as follows:

For the purpose of carrying out the provisions of this Order, the administrator is authorized to utilize the services of available and appropriate personnel of the United States Maritime Commission, the War and Navy Departments, the Bureau of Marine Inspection and Navigation of the Department of Commerce, and other government departments and agencies which are engaged in activities related to the operation of shipping.

Paragraph 8 of the same Order reads in part as follows:

\* \* \* The Administrator may exercise the powers, [fol. 71e] authority and discretion conferred upon him

by this Order through such officials or agencies and in such a manner as he may determine.

The War Shipping Administration is desirous of adopting the most feasible and practicable method of dealing with problems which may arise and relate to the personnel of vessels owned by or bareboat chartered to it. As an illustration of what has already been done in this respect, copies of Statements of Policy entered into between the War Shipping Administration and the various maritime unions are also enclosed.

By virtue of the authority granted under the provisions of the Executive Order quoted above, the Administrator may utilize in behalf of the War Shipping Administration the advice, services and assistance which may be furnished by other appropriate governmental departments and agencies to the end that the operations of vessels by the War Shipping Administration may be conducted at maximum efficiency and without interference and interruptions which might otherwise occur. For these reasons the value of the advice and assistance of the National Labor Relations Board is recognized in matters relating to the designation of collective-bargaining representatives, and to such other problems falling within the scope of the National Labor Relations Act as the War Shipping Administration may determine such advice and assistance is required. Of course, if your Board sees fit to furnish this advice and assistance to the War Shipping Administration, it should be understood that in the state of its advice the War Shipping Administration is compelled not to recognize that the National Labor Relations Board has jurisdiction over employees of the War Shipping Administration and that this question shall be reserved for future determination and adjudication in the event it should ever become pertinent and material in any proceeding or case.

As a means of obtaining a satisfactory arrangement for the adjustment of problems arising during the war emergency, I suggest the following arrangement be entered into:

1. The National Labor Relations Board in its customary manner, will conduct elections and otherwise act in the designation of collective bargaining representatives and in the adjustment of other problems which may involve personnel of vessels owned by or under bareboat charter to the War Shipping Administration.

2. The War Shipping Administration will be given notice of all proceedings which are instituted with the Board affecting our personnel or operating agents. Whenever a petition for certification of representatives under Section 9 (c) of the National Labor Relations Act is instituted, and whenever a charge alleging the commission of an unfair labor practice under that Act is filed, the Regional Director of your Board, in addition to notifying our operating agent immediately concerned, will also send a copy of such notification to the War Shipping Administration, Washington, D. C. The War Shipping Administration will likewise instruct all of its operating agents to give us a similar notice whenever a petition or charge of this nature has been filed. The Regional Directors of your Board will likewise transmit to us copies of complaints and petitions in proceedings commenced under the National Labor Relations Act which involved any of our operating agents.

3. The War Shipping Administration will be placed in a position to contribute facts, some of which may be of a confidential or secret nature, which are relative to the Board's consideration of a case or proceeding under the suggested arrangement.

4. A close liaison shall be maintained between the National Labor Relations Board and the War Shipping Administration in connection with activities of your Board and the War Shipping Administration under this arrangement including conferences relating to the problem of a formula whereby determinations of collective bargaining agents will not be made until a truly representative number of vessels are assigned to our respective operating agents and a correspondingly representative number of personnel are engaged aboard such vessels and whereby the status of collective bargaining agents, once determined, shall not be subject to too frequent challenge or change so as to interfere with the proper and efficient operation of vessels in the furtherance of the war effort.

[fol. 71g] 5. The War Shipping Administration under this arrangement shall be considered as having reserved its rights with respect to the jurisdiction of the Board over personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration.

Sincerely yours, (Sgd.) E. S. Land, Administrator.

National Labor Relations Board,  
Washington, D. C., October 26, 1942.

ADMIRAL E. S. LAND, Administrator,  
War Shipping Administration, Washington, D. C.

DEAR SIR:

The Board has considered your letter of October 20, 1942, and is most anxious to cooperate with the War Shipping Administration in a wholehearted mutual endeavor to adjust problems within the jurisdiction of the Board incident to personnel in the Merchant Marine. To that end the Board would welcome an understanding with the War Shipping Administration whereby on the one hand the Board would administer and apply the National Labor Relations Act to seamen aboard merchant vessels irrespective of the types of charter or agreement under which such vessels operate and, on the other hand, with the understanding that the War Shipping Administration wishes to reserve the legal question whether the Board has jurisdiction with respect to personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration.

The Board is advised by its counsel that no final determination is possible at the present time concerning the jurisdiction of the Board with respect to such personnel. It would appear that so vital a question could not ultimately and decisively be determined in the absence of a full hearing in which the employees, the operators and the War Shipping Administration could present evidence upon which the Board and the courts could make such a determination. [fol. 71h] Nevertheless, the Board is deeply aware of the need for prompt and effective disposition of problems arising in the field of labor relations during the war emergency. Hence, the Board feels that to the extent that litigation can be avoided, the objectives of all would be best served.

As a means of obtaining a satisfactory arrangement for the adjustment of problems arising during the war emergency, the National Labor Relations Board will enter into the following arrangement with the War Shipping Administration:

1. The Board, in its customary manner, will conduct elections and otherwise act in the designation of collective



bargaining representatives and in the adjustment of other problems which may involve personnel of vessels owned by or under bareboat charter to the War Shipping Administration.

2. The War Shipping Administration will be given notice of all proceedings which are instituted with the Board affecting the personnel of vessels owned by or under bareboat charter to the War Shipping Administration. Whenever a petition for certification of representatives under Section 9 (c) of the National Labor Relations Act is instituted, and whenever a charge alleging the commission of an unfair labor practice under that Act is filed, the Regional Directors of the Board, in addition to notifying the operating agent immediately concerned, will also send a copy of such notification to the War Shipping Administration, Washington, D. C. The War Shipping Administration will likewise instruct all of its operating agents to notify it whenever a petition or charge of this nature has been filed. The Regional Directors of the Board will likewise transmit to the War Shipping Administration copies of complaints and petitions in proceedings commenced under the National Labor Relations Act which involved any of the operating agents.

3. The War Shipping Administration will be in a position to contribute facts, some of which may be of a confidential or secret nature, which are relative to the Board's consideration of a case or proceeding under the suggested arrangement.

4. A close liaison shall be maintained between the National Labor Relations Board and the War Shipping Administration in connection with activities of the Board and [fol. 71i] the War Shipping Administration under this arrangement, including conferences relating to the problem of a formula whereby determinations of collective bargaining agents will not be made until a truly representative number of vessels are assigned to your respective operating agents and a correspondingly representative number of personnel are engaged aboard such vessels, and whereby the status of collective bargaining agents, once determined, shall not be subject to too frequent challenge or change so as to interfere with the proper and efficient operation of vessels in the furtherance of the war effort.

◦ In the conclusion, the National Labor Relations Board understands that the War Shipping Administration under this arrangement shall be considered as having reserved its rights with respect to the jurisdiction of the Board over personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration.

Sincerely yours, (Sgd.) H. A. Millis.

War Shipping Administration,  
Washington 25, D. C., March 30, 1943.

National Labor Relations Board,  
Washington, D. C.

GENTLEMEN:

Reference is made to the exchange of correspondence between the National Labor Relations Board and the War Shipping Administration, copies of which are attached.

The War Shipping Administration is advised that some questions have arisen in relation to elections being conducted by your Board on vessels operated by General Agents of the War Shipping Administration. In some instances, the General Agent may operate vessels only under time charter; in other instances, the General Agent may operate vessels only under bareboat charter or general agency agreement; and in still other cases, the General Agent may engage in both types of operations, that is, he may operate vessels both under time charter and also under bareboat charter and general agency agreement. In this last mentioned type of [fol. 71j] operation, employees who had been originally employed by the General Agent prior to the requisition may find themselves employed on bareboat chartered or government-owned vessels; and new employees may find themselves indiscriminately employed on vessels operated under both types of charter or general agency agreement.

The controlling purpose of the exchange of correspondence between the National Labor Relations Board and the War Shipping Administration was to utilize, in the successful operation of the American Merchant Marine by the War Shipping Administration, the experience and trained personnel of the National Labor Relations Board in the field of its customary jurisdiction. What is the unit ap-

appropriate for the purposes of collective bargaining in such a matter? The War Shipping Administration therefore expresses no views as to what the appropriate unit is or how these elections shall be conducted beyond stating that the War Shipping Administration has no objection if the National Labor Relations Board should conclude to treat all of the personnel under the immediate direction of a general agent as an appropriate unit, irrespective of the form of charter arrangement, and irrespective of conclusions whether a given employee is employed by the War Shipping Administration or the operator.

Sincerely yours, (Sgd.) E. S. Land, Administrator.

National Labor Relations Board,  
Washington, D. C., September 14, 1943.

ADMIRAL E. S. LAND, Administrator,  
War Shipping Administration, Washington, D. C.

Re: American-Hawaiian Steamship Company,  
Case No. R-3688.

DEAR SIR:

Reference is made to your letter of October 20, 1942, and the reply of the National Labor Relations Board dated October 26, 1942, relating to the exercise by the National Labor Relations Board of jurisdiction over personnel aboard [fol. 71k] vessels owned by or bareboat chartered to the War Shipping Administration.

The proceeding referred to above is pending before the Board on a petition for investigation and certification of representatives for employees of American-Hawaiian Steamship Company. The case squarely presents the legal question whether the National Labor Relations Board has jurisdiction with respect to personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration and which the aforesaid Company has been assigned for operation and servicing pursuant to the general agency agreement with the War Shipping Administration. The Company has taken the position that personnel aboard such vessels are employees of the United States, and that in consequence the National Labor Relations Board has no juris-

diction under the National Labor Relations Act. For the formal record in this proceeding, the National Labor Relations Board requests that the War Shipping Administration state whether or not the personnel involved in the instant case are regarded by the War Shipping Administration as employees of the United States.

Sincerely yours, (Sgd.) H. A. Millis.

War Shipping Administration,  
Washington 25, D. C., November 9, 1943.

National Labor Relations Board,  
Washington, D. C.

GENTLEMEN :

This acknowledges your letter of September 14, 1943, concerning the American-Hawaiian Steamship Company, your Case No. R-3688, in which the National Labor Relations Board requests that the War Shipping Administration state whether or not the personnel involved are regarded by the War Shipping Administration as employees of the United States.

The desirability of reserving this question, without interruption or interference with the processes of the National Labor Relations Board, was the basis of our exchanges of correspondence, copies of which are attached.

[fol. 71] - At the outset, I should like to make it clear that the War Shipping Administration considers this arrangement to be most helpful, and hopes that it may be continued. Moreover, from the standpoint of the War Shipping Administration, action by the National Labor Relations Board, in accordance with its usual procedures, for the settlement of whatever difference may exist between American-Hawaiian Steamship Company and the personnel employed on board vessels owned by or bareboat chartered to the Administration and operated by the Company as agent for the Administration, would be in conformity with the arrangement referred to. Also such action by the Board would appear to be in conformity with its decisions in the cases of the Cosmopolitan Shipping Company, Inc., 2 N. L. R. B. 759, America France Line et al., 3 N. L. R. B. 64, and Southgate Nelson Corporation, 3 N. L. R. B. 535.



Your letter of September 14, 1943, however, asks for a statement as to whether the personnel involved in this proceeding are regarded by the War Shipping Administration as employees of the United States. In this connection, we are in agreement with the statement in your letter of October 26, 1942, as follows:

It would appear that so vital a question could not ultimately and decisively be determined in the absence of a full hearing in which the employees, the operators and the War Shipping Administration could present evidence upon which the Board and the courts could make such a determination.

Therefore, instead of attempting to state legal conclusions, we submit such facts as are known by the War Shipping Administration to have a bearing on the problem in addition to those outlined in our prior exchanges of correspondence.

The Executive Order creating the War Shipping Administration contemplates the operation of the American Merchant Marine as a civilian enterprise. In the exercise of its various functions and in the conduct of its activities, the War Shipping Administration in general is authorized to operate with the powers of a business or a commercial organization under the provisions of the Merchant Marine Act of 1936. These activities are so broad, and the need for emergency action has been so great that the Administrator [fol. 71m] cannot function with the usual restrictions applicable to government agencies.

At the time of our letter of October 20, 1942, and as stated therein, we were advised that the personnel in question were employees of the United States and were then so considered and treated by other governmental departments and agencies for the purposes of the Civil Service Retirement Act, the United States Employees Compensation Act, the Federal Social Security Laws, and the Federal Employment Tax Laws.

Shortly after that time, the problem of the status of merchant seamen employed on vessels owned by or bareboat chartered to the War Shipping Administration was submitted to the Congress in connection with H. R. 133, 78th Congress. This bill as enacted (Public Law 17, 78th Congress, approved March 24, 1943) put all merchant seamen

on the same basis as seamen in private employment with respect to: (1) the right to wages, maintenance, and cure, in case of illness or injury in the ship's service; (2) the right to the benefits of the Public Health Service, including Marine Hospitals; (3) old-age and survivors' insurance under the Social Security Act; (4) the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances; (5) the right to action under the Jones Act for injury or death resulting from negligence of the employer; (6) the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act, except that claims with respect to Social Security benefits shall be prosecuted in accordance with the procedure provided in the Social Security Law; (7) the protection of war-risk insurance at the employer's expense, in accordance with the decisions of the Maritime War Emergency Board, as required for all privately employed seamen. Similarly, they are entitled to war-bonus payments under decisions of this Board.

Moreover, Public Law 17 excludes merchant seamen from the operation of the following statutes which ordinarily cover government employees: (1) Civil Service Retirement Act, because as private employees they are covered by the Social Security Act; (2) United States Employees Compensation Act, because as private employees they are covered [fol. 71n] by the Jones Act, and have the protection of war-risk insurance under decisions of the Maritime War Emergency Board; (3) Public Law 490, because the pay and allowances provided in that Act for missing and interned employees of the United States are furnished under the requirements of the Maritime War Emergency Board; and (4) Public Law 784, providing war-casualty compensation and detention payments for contract employees serving outside the United States.

In reporting H. R. 133 to the House of Representatives, the Committee on Merchant Marine and Fisheries said:

The basic scope and philosophy of the measure is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefit.

At the time the War Shipping Administration requisitioned the American Merchant Marine, the great majority

of trained and qualified seagoing personnel were members of the various established maritime labor organization, and most operators were parties to collective-bargaining agreements with them. In May 1942, the War Shipping Administrator signed documents known as the Statements of Policy with all of the principal maritime labor organizations. Under the Statements of Policy the War Shipping Administration agreed that, as steamship operators were appointed as agents of the War Shipping Administration, their customary and usual practices of securing and dealing with seagoing personnel would not be disturbed. It was the purpose and understanding of the Statements of Policy that collective bargaining and collective-bargaining procedures and practices, which were established in the industry and which remained established on time-chartered vessels after requisition, should be extended and maintained on vessels bareboat chartered to or owned by the War Shipping Administration. The foregoing development is summarized in the report of the Committee on Merchant Marine and Fisheries to the House of Representatives with respect to H. R. 133, as follows:

Shortly after the appointment of the Administrator, he adopted a statement of labor policy in which he [fol. 71o] specifically provided that "the provisions of the existing collective-bargaining agreements be continued and observed unless changed by mutual agreement." Accordingly, the seamen employed by the War Shipping Administration through its general agents are entitled to all of the contractual rights of seamen on commercial vessels, including overtime compensation, right to settle disputes through arbitration, special bonuses and penalty provisions, and so forth. By this means, there has been preserved existing labor structures which have been built up in a process of experimentation and evolution, and there has been maintained and utilized for the war effort the experience of responsible organizations and leadership. Although employees of the Government, these seamen are paid by the general agents directly in the same manner as payment is made in commercial operations, the funds for such payments having been lodged in bank accounts maintained by the general agents out of revenues received from the operation or from advances made by the Administrator.

The Committee likewise considered the possibility of amendment of the National Labor Relations Act and in the same report stated:

Suggestions have been made that the National Labor Relations Act be made applicable to seamen, notwithstanding the fact that seamen employed by the Government would not be entitled to benefits under that Act. The Committee understands that it is the intention of the Administrator of the War Shipping Administration to avail himself of the facilities of the National Labor Relations Board for the purpose of aiding in the maintenance of collective-bargaining processes and adjusting problems in such connection when consistent with the prime objective of a vigorous and successful prosecution of the war. Under the Executive Order creating the War Shipping Administration, the Administrator has full authority to avail himself of such services, and in view of the expressed attitude in this connection, it seems unnecessary to consider further suggestions for making the National Labor Relations Act specifically applicable to seamen by Statute.

The Administrator's proposed solution to this problem would appear to assure seamen the substantial benefits of the National Labor Relations Act without infringing upon the well-established principles that the United States as an employer is not subject to the National Labor Relations Act. The Administrator could avoid subjecting disputes or other problems to the National Labor Relations Board in cases where this might interfere with the effective prosecution of his duties and functions. Accordingly, this solution of the problem seems to make legislative action unnecessary.

In view of the foregoing considerations, there appears to be no reason, from the War Shipping Administration standpoint, why the Case at hand should not be disposed of in accordance with the arrangement established by our exchanges of correspondence, and it is not the desire of the War Shipping Administration that there be any departure from that arrangement.

Sincerely yours, (Sgd.) E. S. Land, Administrator.



## GAA 4-4-42. Contract WSA-215

## Service Agreement for Vessels of Which the War Shipping Administration Is Owners or Owner Pro Hac Vice

This Agreement, made as of October 19, 1941, between the United States of America, (herein called the "United States") acting by and through the Administrator, War Shipping Administration, and Moore-McCormack Lines, Inc., a corporation organized and existing under the laws of Delaware, and having its principal place of business at New York, N. Y., (herein called the "General Agent").

Witnesseth: That in consideration of the reciprocal undertakings and promises of the parties herein expressed:

Article 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time.

Article 2. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels, as have been or may be by the United States assigned to and accepted by the General Agent for that purpose.

Article 3A. To the best of its ability, the General Agent shall for the account of the United States:

(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyages, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices;

(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States for all moneys collected or disbursed by it or its agents;

(c) Equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe;

(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid [fol. 72b] in the customary manner with funds provided by the United States hereunder.

(e) Issue or cause to be issued to shippers customary freight contracts and Bills of Lading. Unless the United States shall otherwise instruct, such Bills of Lading shall contain all exemptions and stipulations usual to the particular trade or service in which the vessels may be engaged, and reserve a lien upon all cargoes for the payment of freight, primeage charges, dead freight, demurrage, forwarding charges, advance charges for carriage to port of shipment, for contributions in general average and special charges on cargo and for all fines or penalties which the vessels or cargoes may incur by reason of illegal, incorrect or insufficient marking or addressing of packages or description of their contents. After a uniform Bill of Lading shall have been adopted by the United States, such Bill of Lading shall be used in all cases as soon as practicable after receipt thereof by the General Agent with such modifications as shall be necessary for the particular trades in which the vessels hereunder shall from time to time be employed. Pending the issuance of such

uniform Bill of Lading, the General Agent may continue to use its usual commercial form of Bill of Lading.

As soon as practicable after April 1, 1942, all Bills of Lading shall be issued by the General Agent or its agents as agent for the Master and the signature clause may provide substantially that the General Agent makes no warranty or representation as to the authority of the United States or the Master to enter into the agreement, and that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof.

2 Article 3B. The General Agent agrees, without prejudice to its rights under the provisions of Articles 8 and 16 hereof, to:

(a) Perform the duties required to be performed by it hereunder in an economical and efficient manner, and exercise due diligence to protect and safeguard the interests of the United States in all respects and to [fol. 72c] avoid loss and damage of every nature to the United States;

(b) Exercise due diligence to see that all Bills of Lading are properly issued, all wharf receipts for freight are non-negotiable, and where required, a freight contract or permit is issued for each shipment;

(c) Furnish and maintain during the period of this Agreement, at its own expense, a bond with sufficient surety, in such amount as the United States shall determine, such bond to be approved by the United States as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the General Agent contained in this Agreement, including, without limitation of the foregoing the condition faithfully to account to the United States for all funds collected and disbursed and funds and property received by the General Agent or its agents. The General Agent may, in lieu of furnishing such bond, pledge direct or fully guaranteed obligations of the United States of America of the face value of the penalty of the bond under an agreement satisfactory in form to the United States;

(d) Without the consent of the United States, the General Agent shall not sell, assign or transfer, either directly or indirectly, or through any reorganization, merger or consolidation, this Agreement or an interest therein, nor make any agreement or arrangement whereby the service to be performed hereunder is to be performed by any other person, whether an agent or otherwise, except as provided in Article 6 hereof.

Article 4. (a) The General Agent and, to the extent required by the United States, every related or affiliated company or holding company of the General Agent, authorized as provided in Article 13 hereof, to render any service or to furnish any stores, supplies, equipment, provisions, materials or facilities which are for the account of the United States under the terms of this Agreement, shall (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in [fol. 72d] such form and under such regulations as may be prescribed by the United States; and (2) file, upon notice from the United States, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which, in the opinion of the United States, affect the results in, the performance of, or transactions or operations under this Agreement.

(b) The United States is hereby authorized to examine and audit the books, records and accounts of all persons referred to above in this Article whenever it may deem it necessary or desirable.

(c) Upon the willful failure or willful refusal of any person described in this Article to comply with the provisions of this Article, the United States may rescind this Agreement.

Article 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine: Provided, That with respect to vessels allocated before February 25, 1942, compensation shall not be less than the amount of earnings



which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942. Such compensation shall be deemed to cover, but without limitation, the General Agent's administrative and general expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than taxes for which the General Agent is reimbursed under Article 7 hereof), and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder.

Article 6. The General Agent shall exercise due diligence in the selection of agents. Such agents shall be subject to disapproval by the United States and any agency agreement shall be terminated by the General Agent whenever the United States shall so direct. Any compensation payable by the General Agent to its agents for services rendered in connection with the vessels assigned hereunder shall be subject to approval by the United States. In the event that any of the vessels covered by this Agreement are operated in a service in which an American citizen maintained a berth operation with American flag vessels on September 1, 1939, the General Agent, upon request of the United States, will assign such vessels to such berth operators as agents as may be appropriate under form of agreement prescribed by the United States. Agency fees or equivalent allowances for branch offices in accordance with schedules approved by the United States will be reimbursable under Article 7 hereof.

Article 7. The United States shall reimburse the General Agent at stated intervals determined by the United States for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder) and any other expenses which are not

directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. The General Agent shall be reimbursed for sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder if the General Agent shall have used due diligence to secure immunity from such taxation. To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures, accruing during the term hereof) in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements, or by action of the Maritime War Emergency Board, any pay-[fol. 72f] ments made by the General Agent to a pension fund in accordance with a pension plan in effect on the effective date of this Agreement with respect to the officers and members of the crew of said vessels who are entitled to benefits under such plan, on the effective date of this Agreement, for the amount of any social security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise. The United States may disallow, in whole or in part, as it may deem appropriate, and deny reimbursement for, expenses which are found to have been made in willful contravention of any outstanding instructions or which were clearly improvident or excessive.

Any moneys advanced to bonded persons by the General Agent for ship disbursements which are lost by reason of a casualty to the Vessel on which the money so advanced is carried shall in the event of such loss be considered an expense of the General Agent, subject to reimbursement as is in the Article 7 provided.

The United States may advance moneys to the General Agent to provide for disbursements hereunder in accordance with such regulations or conditions as the United States may from time to time prescribe.

Article 8. The United States shall, without cost or expense to the General Agent, procure or provide insurance

against all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder (which insurance shall include the General Agent and the vessel personnel as assureds) including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage caused to other vessels, persons or property, and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance. The General Agent shall furnish reports and information and comply fully with all instructions that may be issued with regard to all salvage claims, damages, losses or other claims. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to such risks. The United States may assume any of the foregoing risks except those relating to P. & I. risks and collision liabilities. At all times during the period of this Agreement, the United States shall at its own expense provide and pay for insurance with respect to each vessel hereunder against protection and indemnity marine and war risks, and collision liabilities without limit as to liability as to the amount of any claim or the aggregate of any claims thereunder. The United States at its election may write all or any such insurance, including that against P. & I. and collision liabilities, in its own fund, pursuant to a duly executed policy or policies. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to any of the foregoing risks. All insurance hereunder shall cover both the United States and the General Agent.

Article 9. In the event of general average involving vessels assigned to the General Agent under this Agreement, the General Agent shall comply fully with all instructions issued by the United States in that connection including instructions as to the appointment of adjuster, obtaining general average security and asserting liens for that purpose unless otherwise instructed, and supplying the adjuster with all disbursements accounts, documents and data required in the adjustment, statement and settlement of the general average. Reasonable compensation for and

general average allowances to the General Agent in such cases shall be in accordance with directions, orders or regulations of the United States.

Article 10. Salvage claims for services rendered to vessels other than vessels owned or controlled by the United States shall be handled by, and be under the control of, the United States. Salvage awards for services rendered to other vessels owned or controlled by the United States including the vessels hereunder shall be made by the United States. The General Agent shall furnish the United States with full reports and information on all salvage services rendered.

Article 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice.

[fol. 72h] (b) Upon giving to the United States thirty (30) days' written or telegraphic notice, the General Agent shall have the right to terminate this Agreement, but termination by the General Agent shall not become effective as to any vessel until her arrival and discharge at a continental United States port.

(c) This Agreement may be terminated, modified, or amended at any time by mutual consent.

Article 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in custody of the General Agent pursuant to this Agreement, shall be immediately turned over to the United States, at times and places to be fixed by the United States, and the United States may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid: Provided, That the General Agent shall, if required by the United States, adjust, settle and liquidate the current business of the vessels. Notwithstanding the foregoing provisions, when the United States shall so direct, the General Agent shall complete the business of voyages commenced prior to the date as of which the Agreement shall be terminated, and, if directed by the United States and subject to any instruc-



tions issued by the United States with respect thereto, the General Agent shall continue to book cargo for the vessels for the next voyages after the termination of this Agreement. No such termination of this Agreement shall relieve either party of liability to the other in respect of matters arising prior to the date of such termination or of any obligation hereunder to indemnify the other party in respect of any claim or demand thereafter asserted, arising out of any matter done or omitted prior to the date of such termination.

Article 13. Agreements or arrangements with any interested or related company to render any service or to furnish any stores, supplies, equipment, materials, repairs, or facilities hereunder shall be submitted to the United States for approval as to employment. Unless and until such agreements or arrangements have been approved by the United States, compensation paid to any interested or related company shall be subject to review and readjustment by the United States. In connection with such review and readjustment, the United States may deny reimbursement hereunder of any portion of such compensation which it deems to be in excess of fair and reasonable compensation. The United States may also deny reimbursement, in whole or in part, of compensation under any arrangement or agreement with an interested or related company which it deems to be exorbitant, extortionate or fraudulent. The term "interested company" shall mean any person, firm, or corporation in which the General Agent, or any related company of the General Agent, or any officer or director of the General Agent, or any employee of the General Agent who is charged with executive or supervisory duties, or any member of the immediate family of any such officer, director or employee, or any officer or director of any related company of the General Agent or any member of the immediate family of an officer or director of any related company of the General Agent, owns any substantial pecuniary interest directly or indirectly. The term "related company", used to indicate a relationship with the General Agent for the purposes of this Article only, shall include any person or concern that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the General Agent. The term "control" (including

the terms "controlled by" and "under common control with") as used herein means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the General Agent (or related company), whether through ownership of voting securities, by contract, or otherwise.

Article 14. The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels; and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and [fol. 72j] shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable.

Article 15. The United States shall, when it may legally do so, have the advantage of any existing, or future, contracts of the General Agent for the purchase or rental of materials, fuel, supplies, facilities, services, of equipment, if this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the General Agent.

Article 16. (a) The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorney's fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, troops, gun crews, crew mem-

bers, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, claims for damages for personal injury or loss of life, and claims for maintenance and cure.

(b) In view of the extraordinary wartime conditions under which vessels will be operated hereunder, the General Agent shall be under no responsibility or liability to the United States for loss or damage to the vessels arising out of any error of judgment or any negligence on the part of any of the General Agent's officers, agents, employees, or otherwise. However, the General Agent may be held liable for loss or damage not covered by insurance or assumed by the United States as required under Article 8 of this Agreement, if such loss or damage is directly and primarily caused by willful misconduct of principal supervisory shore-side personnel or by gross negligence of the General Agent in the procurement of licensed officers or in the selection of principal supervisory shoreside personnel.

(c) In the event that the General Agent shall perform any stevedoring, terminal ship repair or similar service [fol. 72k] for the vessels hereunder at commercial rates, the General Agent shall have all the obligations and responsibilities of the person performing such services under the standard or other approved form of contract with the United States or, in the absence of such standard or approved form, under usual commercial practice:

(d) The General Agent shall be under no liability to the United States of any kind or nature whatsoever in the event that the General Agent should fail to obtain officers or crews for the operation of the vessels, or fail to arrange for the fitting out, refitting, maintenance or repair of said vessels, or fail to perform any other service hereunder by reason of any labor shortage, dispute or difficulty, or any strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the General Agent whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities.

Article 17. Wherever and whenever herein any right, power, or authority is granted or given to the United States,

such right, power, or authority may be exercised in all cases by the War Shipping Administration or such agent or agents as it may appoint or by its nominee, and the act or acts of such agent or agents or nominee, when taken, shall constitute the act of the United States hereunder. In performing its services hereunder, the General Agent may rely upon the instructions and directions of the Administrator, his officers and responsible employees, or upon the instructions and directions of any person or agency authorized by the Administrator. Wherever practicable, the General Agent shall request written confirmation of any oral instructions or directions so given.

Article 18. (a) The General Agent warrants that it has not employed any person to solicit or secure this Agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this Agreement or in its discretion to deduct from any amount payable hereunder the amount of such commission, percentage, brokerage or contingent fee.

(b) In any act performed under this Agreement, the General Agent and any subcontractor shall not discriminate [fol. 721] against any citizen of the United States on the ground of race, creed, color or national origin.

Article 19. No person elected or appointed a member of or delegate to Congress or a Resident Commissioner, directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account shall hold or enjoy this Agreement in whole or in part, except as provided in Section 206, Title 18, U. S. C. The General Agent shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

Article 20. Subject to the provisions of Article 5 hereof, this Agreement is in substitution of and hereby abrogates and replaces the so-called ~~1c~~ Bareboat Charter Agreements relating to the assignment or allocation to the General Agent of the vessels listed on Exhibit A hereto from the dates stated on such exhibit. Preference Agreements relating to such allocated vessels shall be terminated and abrogated as of the same dates.



All rights and obligations of the parties under said abrogated Bareboat Charter and Preference Agreements are hereby cancelled and this Agreement is made retroactive to the cancellation dates thereof as stated on Exhibit A hereto. However, the General Agent shall be reimbursed for any expenditure made before the earliest permissible cancellation date after March 22, 1942, under said agreements to the extent that such expenditure would have been considered in computing additional charter hire or freight under such agreements. This Agreement, unless sooner terminated, shall extend until six months after the cessation of hostilities.

In Witness Whereof, the Parties hereto have executed this Agreement in triplicate the day and year first above written.

United States of America, by E. S. Land, Administrator, War Shipping Administration; by D. F. Houlihan, for the Administrator; Moore-McCormack Lines, Inc., by Henry P. Molloy, Vice-President.

Attest: Albert F. Chrystal, Assistant Secretary.

Approved as to form: W. Radner, General Counsel.  
Beach. Cates. (Seal.)

[fol. 73]

PLAINTIFF'S EXHIBIT No. 11

Minutes of Port Committee Meeting Between Pacific American Shipowners Association and Marine Cooks and Stewards' Association of the Pacific Coast

Time: February 2, 1945 at 2:30 P. M.

Place: Room 310 Financial Center Bldg.

Present: For the Association—Messrs. Brown, Bannister, Capt. Trout. For the Union—Messrs. Burke, Bryson Fritchie.

Also Present: Mr. Cannon, Matson Navigation Company; Mr. George Larsen, for the Association; Messrs. Grant and Williams, Cooks' Union.

Purpose of Meeting: To discuss:—Various claims for overtime and other matters submitted by the Union to the Association in a letter dated January 18, 1945.

Mr. Brown opened the meeting and requested Mr. Burke

to proceed with the matters for which the meeting had been called.

1. It was brought out by Mr. Burke that members of the Steward's Department are being required to make ice. Mr. Burke specifically referred to a claim by a Butcher on the SS Sea Devil, American Hawaiian Steamship Company, who had been required not only to pull the ice but also to operate the ice machines. Mr. Burke claimed that the work had been performed outside the Butcher's regular hours.

Following discussion of the matter, it was agreed and understood that members of the Steward's Department should not be required to make ice or pull ice but that they will distribute the ice once it is pulled, regardless of where the ice machine is located. It was further understood members of the Steward's Department will take care of placing drinking water in Steward's chill boxes without overtime. In this connection, it was brought out by Mr. Brown, that Mr. Malone, Secretary of the Fireman's Union had agreed that members of his department (Wipers) will pull the ice as long as the ice machines are located within the jurisdiction of the Engine Department.

## 2. SS Celestial, American President Lines

This is a claim for overtime by the Steward's Department for commencing serving the crew members their meals after 5:30 P. M. It was pointed out by representatives of the Company that the reason for the meals in question being served late was on account of a dispute between the department [fol. 74] ments. It was also stated the Steward's Department had failed to serve crew members off watch their meals promptly and as a result they could not eat and relieve the men on watch in time to get into the mess room before 5:30 P. M. However, when the vessel was in port the matter was straightened out to everybody's satisfaction and it is not anticipated that any trouble on this question will arise on this vessel in the future. It was agreed by the parties a further investigation would be made upon the return of the vessel to San Francisco and if it was found that the Company's understanding is not correct, some adjustment would be made.

### 3. *SS Cape Means, Matson Navigation Company*

It was claimed by the Union that the Messmen had been required to serve the Captain his meals in his room at sea and in port. The Employers' Committee agreed that as a general rule in the absence of special circumstances the Captains on freighters in port should take their meals in the saloon. It was agreed that at Sea the Master might have his meals brought to his room or the bridge when, for the safety of the vessel due to navigating in convoy, hazardous areas, or under other conditions, the Master could not spare sufficient time away from his duties to go to the saloon to eat.

It was agreed that the justification for meals being served in the Master's room or on the bridge either in port or at sea must be real and the Master must be the judge of the necessity. It was further agreed if any Master arbitrarily had his meals served in his room without justification, overtime would be paid.

Also, the Union claimed overtime for the Butcher because he had been cutting up meat between 7:00 P. M. and 8:00 P. M. This, it was stated, was necessary because the meat which had come aboard in Australia had come in half sides. Some doubt was expressed by the Employers' Committee that it would be necessary for the Butcher to work overtime merely because the meat had not been fabricated as is ordinarily done in United States Ports. Mr. Cannon agreed he would look into this matter also.

### 4. *SS Henry Scott, Oliver J. Olson & Company*

The Union's Committee brought up a similar claim for cutting up meat. It was brought out that the Butcher in question had received three hours' overtime per day because of military passengers carried. This is a further claim for two additional hours' overtime.

The claim was rejected by the Employers' committee on the ground that it is the regular and customary duty of this rating to cut up the meat. That the furnishing of pre-cut and boned cuts, where obtainable, has not changed the customary duties. If any additional meat had to be cut by reason of extra passengers carried, the three hours' daily overtime allowed under the agreement was complete compensation.

### 5. *SS Elmira Victory, Alaska Steamship Company*

This is a claim for weekend overtime in ports other than the home port. It was developed that the vessel had left Portland, Oregon for Honolulu where she discharged part of her cargo and then proceeded to Eniwetok with the remainder of the cargo, together with other cargo picked up at Honolulu. It was further developed that the claim had been previously discussed between members of the Association's staff and the Union's representatives at San Francisco; namely, Messrs. Brown, Burke and Bryson and that [fol. 75] an adjustment of the claim had been made whereby the crew would receive weekend overtime at Honolulu but not at Eniwetok. Resurrection of the claim for additional overtime when at Eniwetok had come from Harris in Seattle who apparently was not fully informed as to the facts in the case.

In the discussion which followed, it was point-out to Mr. Burke by Mr. Brown that apparently Harris is of the opinion that an adjustment of the case is not satisfactory. However, since the adjustment was made in accordance with the rules and facts as presented, the decision as per previous understanding arrived at between the parties should stand. On this basis the Committee's decision was to allow overtime only at Honolulu.

### 6. *Coastwise Pacific Far East Line*

The Union's representative maintained that this company had no designated representative in New York and for that reason it becomes difficult at times to get disputes settled. In discussing the matter Captain Trout stated that as a rule their Masters, when confronted with questionable claims, phone the San Francisco office to get advice as to disposal of claims. This practice, according to Captain Trout, has worked out very satisfactorily in the past. However, Captain Trout agreed that he would investigate the Union's complaint.

### 7. *SS Vernon Kellogg, Grace Line*

This is a claim for weekend overtime at the port of Laurene Marques, East Africa, and also Rio De Janeiro. It was agreed that the claims be settled on the basis of the Memorandum dated May 15, 1942. Accordingly, the crew



would be entitled to weekend overtime in one port in the African area but not in South America.

8. *SS Mariposa, Matson Navigation Company*

Claim for Boston as the home port during the period in which Boston was the turn-around port while the vessel was trading to ports in Iceland. It was the opinion of the Committee that the crew was entitled to one port (home) in the continental United States. That Boston should be considered the home port for this purpose in respect to this particular vessel on the voyages in question.

9. *SS Joseph Holmes, Union Sulphur Company*

This is a claim for overtime while vessel was stranded somewhere in the South Pacific. The claim was rejected by the Employers' Committee on the ground that the work performed in an emergency involving the safety of the vessel for which no overtime is payable under the agreement.

10. *SS Margaret Schafer, Northland Transportation Company*

The Union claimed that a port should be designated in Alaska as the home port of the vessel because the ship was in shuttle service between ports in Alaska. Mr. Brown agreed he will write the company in regard to this matter as the Association was not familiar with the situation.

11. *SS President Grant, American President Lines*

The Union brought up a matter of meals being served to troops and members of a salvage crew subsequent to the stranding of the vessel on February 26, 1944. The claim is for 30¢ per meal and involves some 15,000 odd meals. It was agreed that the Port Steward's staff of APL and the Union's Representatives would get together and check up on the number of meals served and when that is determined Mr. Brown will draft a letter of submission to WSA requesting consideration by the WSA of the Union's request for payment of the claim as it deems proper.

Meeting adjourned at 4:00 P. M.

[fol. 76]

## PLAINTIFF'S EXHIBIT No. 3.

Form No. 31

## Shepard Steamship Company

S/S George Davidson. Voy #1 Out. Date 11/27/43.

Mr. Fred W. Fink. Rating, Able Seaman.

Social Security #390-03-2421.

We hand you herewith the sum of \$744.95 covering your earned wages including overtime and bonus in full, for the period from June 8, 1943 to 11/26/43 computed as follows:

Wages	563.33
	6.67
Bonus 480	486.67
Overtime	175.53
Board & Lodging	202.80
Total	<u>1428.33</u>

## Deductions:

Social Security	14.29
Victory Tax	46.83
Non Resident Alien Tax	
Board and Lodging	202.80
Cash Advance	148.23
Slops	21.23
Allotments	<u>250.—</u>
Fines & Other Deductions	
Total Deduction	<u>683.38</u>

Balance	<u>744.95</u>
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I hereby acknowledge Receipt of the Above Balance.

\_\_\_\_\_, Signature.

This statement is issued in accordance with legal requirements.

NCG 722

United States Coast Guard

## Seaman's Allotment Note

(Act of June 26, 1884, Section 10 as amended—U. S. C., title 46, sec. 599.)

Name of Ship: S.S. "George Davidson".

Now Bound on Voyage to: One or more ports in any part of the world.

Vancouver, Wash., June, 1943.

One month after date, pay the sum of Fifty and 00/100 dollars, part of the wages of Fred W. Fink engaged to serve as Able Seaman in the above-named ship, to Mrs. Gertrude Fink his wife for Maintenance and continue to make such payments monthly for Voyage months: \$50.00.

To Shepard Steamship Co., Thomas C. Price, Master.  
Payable at 6110 N. E. Hoyt St., Fred W. Fink, Seaman.

Approved after examination of the allotment and of the parties to it as prescribed by law:

Portland, Oregon.

Rudolph Grady, U. S. C. G. Shipping Commissioner,  
Portland, Ore.

(Endorsed) Allotment to Mrs. Gertrude Fink. Relationship Wife. Street and Number 6110 N. E. Hoyt Street. City and State, Portland, Oregon. \$50.00.

\* It shall be lawful for any seaman to stipulate in his shipping agreement for an allotment of any portion of the wages he may earn to his grandparents, parents, wife, sister, or children, or for deposits to be made in an account opened by him and maintained in his name either at a savings bank or a United States postal savings depository subject to the governing regulations thereof.

[fol. 78] DEFENDANT'S EXHIBIT "H"

War Shipping Administration, 200 Bush Street, San  
Francisco, California

May 24, 1943.

Shepard SS. Co., Railway Exchange Building, Portland,  
Oregon.

Subject: SS George Davidson

GENTLEMEN:

On May 22d we advised you that the above vessel was scheduled for the India service of the British Ministry of War Transport under berth sub-agency of the American President Lines.

Please disregard this letter, as the destination of this vessel is now the Red Sea, and it will load under berth sub-agency of the American Mail Lines.

Will you kindly contact the American Mail Line and ascertain who they expect to represent them as berth sub-agent at destination. It is our desire that the same agent that acts as destination for the berth sub-agent also be named by you as agent in husbanding the vessel.

Yours very truly, H. N. Middleton, Chief of Allocations and Assignments.

HNM/rh

cc—Mr. Keating, WSA, Washington D. C.; Mr. Darr, WSA, Washington, D. C.; Mr. Brown, WSA, Seattle, Washington; Mr. Powell, WSA, Portland, Oregon; Mr. Patten, WSA, San Francisco; British Ministry of War Transport; American Mail Line, Seattle, Washington; American President Lines, San Francisco.

[fol. 79] War Shipping Administration 200 Bush Street,  
San Francisco, California

May 25, 1943.

Shepard SS. Co., Railway Exchange Building, Portland,  
Oregon.

Subject: SS George Davidson

GENTLEMEN:

Please disregard all previous letters concerning the employment of this vessel, which is now assigned to the India service of the British Ministry of War Transport under berth sub-agency of the American President Lines.



As previously requested, kindly contact the American President Lines and ascertain who they expect to represent them as berth sub-agent at destination. It is our desire that the same agent that acts at destination for the berth sub-agent also be named by you as agent in husbanding the vessel.

Yours very truly, H. N. Middleton, Chief of Allocations and Assignments.

HNM/rh

cc—Mr. Keating, WSA, Washington D. C.; Mr. Darr, WSA, Washington, D. C.; Mr. Brown, WSA, Seattle, Washington; Mr. Powell, WSA, Portland, Oregon; Mr. Patten, WSA, San Francisco; British Ministry of War Transport; American Mail Line, Seattle; Washington; American President Lines, San Francisco.

[fol. 80] War Shipping Administration, 200 Bush Street,  
San Francisco, California

May 22, 1943.

Shepard SS. Co., Railway Exchange Building, Portland,  
Oregon.

Subject: SS George Davidson

GENTLEMEN:

The above vessel, allocated to you for operation under Service Agreement Form GAA, is expected ready for delivery at Portland about June 1.

This vessel has been assigned to the India service of the British Ministry of War Transport under berth sub-agency of the American President Lines.

Will you kindly contact the American President Lines and ascertain who they expect to represent them as berth sub-agent at destination. It is our desire that the same agent that acts at destination for the berth sub-agent also be named by you as agent in husbanding the vessel.

Yours very truly, H. N. Middleton, Chief of Allocations and Assignments.

HNM/rh

cc—Mr. Keating, WSA, Washington, D. C.; Mr. Darr, WSA, Washington, D. C.; Mr. Patten, WSA, San Francisco; British Ministry of War Transport; American President Lines, San Francisco.

[fol. 81] DEFENDANT'S EXHIBIT "J"

June 2, 1943.

American President Lines, Ltd., 311 California Street, San Francisco, California.

Attn: Mr. W. K. Varcoe, Assistant Freight Traffic Manager.

GENTLEMEN:

You or your designated nominee are hereby authorized to enter into and do all things necessary for the proper preparation and execution on my behalf and as my agent of Bills of Lading or other contracts for the carriage of goods or passengers on board the SS. George Davidson, on her current voyage as Berth sub-Agents.

(S.) Thomas C. Price (Sgd.), Master.

[fol. 82] DEFENDANT'S EXHIBIT "I"

American President Lines, 311 California Street, San Francisco, California U.S.A., Trans-Pacific Service, Round-World Service

May 27, 1943.

Shepard Steamship Company, Railway Exchange Building, Portland, Oregon.

SS George Davidson

GENTLEMEN:

In accordance with official advice from the War Shipping Administration, San Francisco, we have, as you know, been nominated Berth sub-Agent for the above-named vessel for a voyage to the Middle East account British Ministry of War Transport.

In compliance with instructions contained in W.S.A. General Order No. 16 (War Shiplading 7/1/42), we would greatly appreciate it if you would ask the Master of this vessel to sign the usual letter attached authorizing American President Lines to sign bills of lading on his behalf, returning the signed letter to us for our permanent record.

Yours very truly, W. K. Varcoe, Assistant Freight Traffic Manager. The United States of America, War Shipping Administration, By American President Lines, Ltd. (Agent).

Attachment.

[fol. 83]

## DEFENDANT'S EXHIBIT "G"

Form WSA 7085. Rev. June, 1942

War Shipping Administration, Division of Operations,  
Washington

## Service Record \*

Date: — —, — —.

Name in full

(Last)

(First)

(Middle)

Permanent home address

Phone

(City)

(State)

Born—Town

State

Country

Month

Day

Year

Naturalized at

Date

Height

Weight

Married or single

Grade of license

Serial and issued numbers

License issued at

Date of issue

Naval Reserve rank

Where received training and education not shown under  
particulars of sea service?

(Signature)

On what ship are you accepting employment?

What position?

Date

(See Other Side for Particulars of Sea Service)

Applicant's complete record must be given in full, and  
dates of entering and leaving each position accurately  
shown.

[fol. 84]

## Particulars of Sea Service

Vessel \*Size \*\*Type Rating From— To— Owner

To be inserted after each vessel.

\* This form not required to be made out when trans-  
ferring from ship to ship. In such case form No. 7085-A  
is required. 16-6062-2.\* Column "Size"—Deck officers; gross tonnage; engineer  
officers, horsepower.\*\* Column "Type"—Deck officers, steam, sail, or auxil-  
iary; engineer officers, reciprocating, turbine, or Diesel.

[fol. 85]

## DEFENDANT'S EXHIBIT "B"

Serial No. G829958

Department of Commerce, Bureau of Marine Inspection and  
Navigation

## Certificate of Discharge

Fred W. Fink (Signature of Seaman); Thomas C.  
Price (Master of Vessel.)

I Hereby Certify that the above entries were made by  
me and are correct and that the signatures hereto were  
witnessed by me.

Dated this 27th day of Nov., 1943.

J. P. Phillips, United States Shipping Commissioner  
(Or Master of Vessel.)

Act Dp.

Note—Whenever a master performs the duties of the  
shipping commissioner under this act, the master shall sign  
the certification on the line designated for the shipping  
commissioner's signature.

Gas issued: 12/1/43.

Name of Seaman: Fred W. Fink, Certificate.

Citizenship: U. S. A. of Identification No. z354110.

Rating: Able Seaman.

Date of Shipment: June 8, 1943.

Place of Shipment: Vancouver, Wash.

Date of Discharge: Nov. 26, 1943.

Place of Discharge: Baltimore, Md.

Name of Ship: George Davidson.

Official No. 243491.

Class of vessel: Steam (steam, Motor, Sail, or Barge.)

Nature of Voyage: Foreign (Foreign, Intercoastal or  
Coastwise.)



[fol. 86]

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE  
COUNTY OF MULTNOMAH

No. 154958

FRED W. FINK, Plaintiff,

vs.

SHEPARD STEAMSHIP COMPANY, a Corporation, Defendant

**Proposed Bill of Exceptions (Presented February 14, 1947—  
Filed February 19, 1947)**

## TENDER AND SERVICE

To the Clerk:

The above named defendant, Shepard Steamship Company, herewith tenders a proposed bill of exceptions in the above entitled cause, consisting of a transcript of the whole testimony and all the proceedings had at the trial, including the exhibits offered and received or rejected, defendant's requested Instruction No. 1, the instructions of the Court to the jury, defendant's motion for judgment notwithstanding the verdict, or, in the alternative, motion for new trial, the Court's memorandum opinion denying said motion, and the order denying the same. This bill of exceptions contains all the evidence and a complete record of the trial.

(S.) Wood Mathiessen & Wood, Erskine B. Wood,  
Attorneys for Defendant.

Service of this proposed bill of exceptions, on February 13th, 1947, by delivery of a copy, is hereby admitted.

(S.) Edwin T. Hicks, of Attorneys for Plaintiff.

[fols. 87-100] IN CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

## JUDGE'S CERTIFICATE

I, the undersigned, Judge of the above entitled court, before whom this case was tried, hereby certify that the foregoing contains all of the testimony and a record of all

the proceedings had at the trial, defendant's requested instruction No. 1, the instructions of the Court to the jury; defendant's motion for judgment notwithstanding the verdict, or, in the alternative, motion for new trial, the Court's memorandum opinion and order denying said motion; and that the said transcript, instructions requested by the defendant, motion for new trial, memorandum opinion and order denying same, together with the exhibits referred to in said transcript and made a part of the bill of exceptions, are a complete record of all the evidence and proceedings had at the trial of this cause and on the motion for a new trial, and same are now settled and approved as a true bill of exceptions in this cause.

(S.) Walter L. Tooze, Judge

Dated February 19th, 1947.

[fols. 101-102] IN CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

#### DEFENDANT'S REQUESTED INSTRUCTION

Defendant Shepard Steamship Company requests the Court to give the following instruction to the Jury:

1. You are instructed to return your verdict for the defendant.

(Signed) Wood, Matthiessen & Wood, Attorneys for Defendant.

[fol. 103]

#### COLLOQUY

The Court: In this case of Fink vs. Shepard Steamship Company, it appears that there are really two fundamental problems. The first problem to be solved is the one touching the employment of the plaintiff. That is, by whom was he employed? Was he employed by the defendant Steamship Company or by the War Shipping Administration? And if the Court should be of the opinion as a matter of law, upon the facts presented, and particularly the written evidence, that the plaintiff was not an employee of the defendant, then that would terminate the case in favor of the defendant as a matter of law. On the other hand, should the Court arrive at the conclusion that, on the undisputed facts in the case, the plaintiff was an employee of the defendant Steamship Company within the meaning of the law,

then, of course, there would remain for decision by a jury the question of whether the defendant was negligent in one or more respects (as charged against the defendant in plaintiff's first amended complaint and, if negligent in one or more of such particulars, whether such negligence was the proximate cause of the injuries of which he complains, and, if that was determined by a jury as a matter of fact, the extent of those injuries and the damages to be awarded therefor.

In order to expedite the trial of the case, and for the convenience of both parties, it has been stipulated by the plaintiff and by the defendant that there shall first be tried before the Court, without the intervention of the jury, the question of whether or not the plaintiff was an employee of the defendant.

Mr. Hicks: May I make an observation, your Honor, simply for the purpose of clarification. May we suggest that this stipulation on this particular phase of the liability [fol. 104] question is simply this: as to whether or not the plaintiff has a right to maintain his suit against the defendant company under the Jones Act.

The Court: Yes.

Mr. Hicks: That embraces the principal of whether he has such right *pro hac vice*, or whether he has such right as an employee under the accepted definition of the term. It seems to me the general statement as to whether or not he has the right to sue under the Jones Act, under the situation, is more accurate, perhaps.

The Court: Is that satisfactory?

Mr. Wood: That is satisfactory.

The Court: Very well. I think that more correctly states the position than the Court stated. So that will be considered the stipulation in that respect.

It is also stipulated and agreed that this present jury already empaneled on the trial of this case may be excused and dismissed from further consideration of this case, but that if and when the Court should determine that the plaintiff has a cause of action against the defendant and a right to sue the defendant, then forthwith another jury shall be empaneled to try the remaining issues in the case, which have to do with the matter of whether or not there was negligence, the matter of proximate cause, and the matter of injuries and damage. And when such other jury is em-

paneled the case will be treated just the same as though this jury had been continued over for that purpose. \* \* \*

3. It is agreed that that certain agreement between the United States of America, acting by and through the War Shipping Administration, and Shepard Steamship Company, the same being a standard form of agreement commonly known and referred to as GAA 4-4-42 \* \* \* Such form of agreement referred to is found beginning at page 150 of the said printed transcript of record heretofore referred to, and it is stipulated that a copy thereof may be [fol. 105] substituted for the purposes here. And it is further stipulated and agreed that the vessel "George Davidson" was allocated to the defendant Shepard Steamship Company pursuant to the terms of such General Agency Agreement. And it is agreed that the defendant company executed the form of agreement herein designated as of date June 11, 1942, and that pursuant to such agreement so executed certain vessels, including the "SS George Davidson", were allocated to the defendant company, to-wit, under said contract. \* \* \*

Portland, Oregon, Friday, September 13, 1946, at 10:00 o'clock A. M., Court reconvened, pursuant to adjournment, and proceedings herein were resumed as follows:

The Court: All right, gentlemen. You may proceed. Call your witnesses.

CHARLES W. ATKINS was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Peterson:

Q. Your name is Charles Atkins?

A. Charles Atkins, yes.

Q. What is your occupation, Mr. Atkins?

A. I am at present patrolman for the Sailors' Union of the Pacific.

Q. What are your duties in that capacity?

A. Making all the ships for the Union, transacting the Union business between the companies and the men aboard the vessels in regards to pay-offs and signing on.



Mr. Wood: Could you speak up? I can't hear you over here.

A. My position with the Union is transacting Union business [fol. 106] between the shipowners and the ships regarding the payoff on the vessels and signing on vessels, signing crews on at the beginning of the voyages, seeing that the agreements are lived up to and that everything is in order.

The Court: You are sort of a business agent?

A. Yes, sir; in a way, but it is not called that in my union. My specific job is termed patrolman.

The Court: That is the Sailors' Union of the Pacific?

A. Yes.

By Mr. Peterson:

Q. Mr. Atkins, how long have you held your present position with the union?

A. Since February, 1942.

Q. Prior to that time what was your occupation?

A. I was one of the sailors aboard the vessels.

Q. How long have you followed the sea?

A. Off and on for close to thirty years.

Q. Mr. Thomas, I hand you Plaintiff's Exhibit No. 1 for identification and ask you what that is.

A. This is the Sailors' Union agreement with the Pacific American Steamship Owners Association, the agreement that was in force from the date stated on the face of the agreement.

Q. And it is stated on the face of the agreement that it is dated November 4, 1941, with the further notation "Amended October 1, 1944." Is that correct?

A. That is correct.

Q. Now, is this the contract between the S. U. P.; your union, and the Pacific Steamship Owners Association? do I correctly state that?

A. Pacific American, I believe.

Q. Pacific American Steamship. Will you point out to me [fol. 107] the correct title of the association? This, then, is between the Sailors' Union of the Pacific, your union, and the Pacific American Shipowners Association?

A. That is correct.

Q. Now, do you know of your own knowledge whether or

\*not the Shepard Steamship Company is a member of the Pacific American Shipowners Association?

A. They are.

Mr. Peterson: I offer this in evidence. You have seen it, Mr. Wood, I think.

Mr. Wood: Yes. I have no objection.

The Court: It will be admitted.

(The booklet above referred to, entitled "Agreement between Sailors' Union of the Pacific and Steamship Companies in the Intercoastal and Offshore Trade and the Alaska Lines," was thereupon received in evidence as Plaintiff's Exhibit 1.)

By Mr. Peterson:

Q. Now, Mr. Atkins, when you first held your position as a patrolman was this agreement that you have identified here in full force and effect?

A. It was.

Q. What have been your duties under the terms of this agreement?

A. My duties under that agreement is very specific. I am charged with visiting all the vessels that it is humanly possible for me to visit and ascertain whether or not the agreement is being lived up to.

Q. That the agreement is being lived up to by whom?

A. By both the employers and the men we place aboard the vessels as a union.

Q. What has been the practice in your experience as to the employment of sailors on board vessels?

[fol. 108] A. Would you state that again, please?

Q. What is the procedure for the employment of sailors on board vessels? I speak of the unlicensed deck personnel under the terms of this contract.

A. Well, under the terms of that contract the employers, either directly from their office or by the master, mate or purser, whoever is authorized in charge on the vessel to call for the men, they order the men directly from the Sailors' Union of the Pacific. We in turn, under the terms of the agreement, are charged with shipping those men if they are available.

Q. Now Section 3 of this contract reads: "The Sailors' Union of the Pacific agrees to furnish capable, competent

and satisfactory employees." Now, what you have described here is your understanding as to the way the union complies with this contract: They furnish employees as requested by the employers to man ships?

A. That is correct.

Q. Who makes the request to the union for the employment of a specific number of unlicensed personnel on board a particular vessel?

A. Well, that varies. In ordinary times, in peace times, and at the beginning of the war we adhered to an old policy whereby most of the men were ordered directly from the ships by either the master, the mate, or the purser, whoever was charged by the master, who was in command of the ship. They ordered the men in most cases directly, acting as agents for the company on the vessel.

Q. And requested a certain number of unlicensed deck personnel?

A. Requested whatever was necessary.

Q. Now, this contract, Section 5, provides: "The Union agrees that the Employers shall have the right, in their discretion, to reject men furnished who are considered unsuitable and unsatisfactory. In case any person is re-[fol. 109] jected, the Union agrees to furnish a prompt replacement. When any person is rejected, the employer shall furnish a statement in writing to the union stating the reason for the rejection. If the Union feels that any rejection has been unjust and has worked a hardship on the person, the Union shall without delay take the matter up with that particular employer and attempt to secure an adjustment." What constitutes a rejection by the employer?

A. Well, several things could enter into the picture. Primarily, if the union calls for a certain rating, the man is supposed to be qualified in that rating; the man shipped to fill the order is supposed to be qualified for that rating aboard the vessel. For instance, if it is an A. B.—able seaman—a boatswain or carpenter, those three fall within experienced categories, and if they are called for we are supposed to furnish a man who is competent to fill the position.

Q. Now, Section 6 of this agreement says: "If a satisfactory adjustment cannot be secured with the Employer, the Union shall thereupon refer the matter to the Port Committee, and the Port Committee shall then hear the case and

may order any adjustments that the circumstances in its judgment may warrant." I will ask you if, within your personal knowledge, has a Port Committee been set up under the terms of this contract in Portland, Oregon?

A. Oh, yes. Yes, there is. It has been in existence ever since—that is, immediately that the machinery could be set up after the agreement was drawn. Captain Dyer, of the old States Line, is the chairman of the Port Committee in Portland.

Q. Now, what is the function of the Port Committee with respect to the rejection of employees furnished by the union?

[fol. 110] The Court: Isn't that in the agreement?

Mr. Peterson: I want to show—it is here, your Honor. It says that they shall adjust grievances, and I want Mr. Atkins to explain what their function is; what they actually do.

A. Well, either in the case of a rejected employee, or if it is a controversy on some matter aboard the ship—for instance, borderline overtime that has been turned down in payment by the company, which we claim is just overtime—those cases are often referred to the Port Committee. And sometimes it is the employer, the steamship company, and sometimes it is the union that requests the Port Committee meeting. Either one can request in writing for a Port Committee meeting. And the Chairman of the Port Committee notifies all the Port Committee members and they meet, and whatever the controversy is is placed before the Port Committee, and their judgment is—in respect to the San Francisco Port Committee it is final and binding, but the port committees in the various outlying ports are subject to review by the San Francisco Port Committee.

The Court: Let me ask you generally: Did the Sailors' Union of the Pacific operate strictly under this contract?

A. Yes, your Honor; they did.

The Court: And all the ships during the war emergency were manned through your organization under the terms of this contract?

A. Yes.

By Mr. Peterson:

Q. Now then, within your knowledge, Mr. Atkins, in the Port of Portland, Oregon, has the Port Committee settled



grievances between individual members of the Sailors Union of the Pacific and the respective employers?

The Court: Do you mean steamship companies?

[fol. 111] The Court: The question is do you know of any disputes having been settled before this Port Committee as between the seamen that have been sent to the ships and the steamship companies?

Mr. Hicks: Steamship companies which are operating under general agency agreements.

The Court: Yes.

Mr. Peterson: Yes.

A. Specifically, there is no case, to my knowledge, in the Port of Portland where we have had a rejection that was necessary to take before a port committee. To my knowledge that has never arisen. The agreement also provides that the man shall perform his duties and conduct himself in certain manners, and when he doesn't do that there is no necessity of a port committee meeting. We just simply handle that within the framework of the union itself.

Q. Did the steamship companies negotiate with you on these questions of disputes and grievances that might otherwise have been settled in the Port Committee if an agreement had not been reached?

A. Yes.

Q. Mr. Atkins, could you outline to the Court the difference that has prevailed, if any, in the practice as you have observed it during peace times and after the war?

A. There has been very little changes; none in regards to the contracts. The only changes that have been brought about from time to time by the emergency was merely war time emergency raises in salaries, and bonus areas designated, and so on. The actual agreement itself was never touched.

Q. It appears on its face that it was amended on October 1st, 1944. Do you know what change was accomplished by the amendment?

A. That was merely changes after the bonus areas were [fol. 112] changed. The various rates in those areas were changed. You will find in the back of the agreement references to such changes.

The Court: You mean by bonus areas different parts of the world in which the ships sailed where the danger was greater?

A. That is correct.

The Court: Greater than in other spots?

A. Yes. And those areas did vary. And then there was the question, too, of handling cargoes in outlying emergency ports in the war areas, or fighting areas, where longshoremen were not available or they did not have the ordinary soldier gangs, you know—whatever they called them there—labor gangs and labor battalions in the army or the Seabees were not available. Then you will find slight references in the back there as to rate of pay in overtime and the conditions under which the men would work. Those were included in the amendments.

Q. Now, do you know of your own knowledge whether or not those amendments were negotiated between the steamship companies and the S. U. P.?

A. In all cases, as far as I know, the steamship companies, acting for the agreement, negotiated all of those changes.

Q. Now, let's turn back to the first of this contract, Mr. Atkins, and I will ask you if prior to the war the S.U.P. furnished competent and satisfactory employees to the steamship companies in the same manner that you described before?

A. Yes, we at all times made attempts to furnish competent—

Q. Did you do the same thing after the war?

A. Yes.

Q. And has the procedure changed in any respect as to that particular?

A. No, it has never changed.

Q. Now, as to the right of rejection on the part of the steamship companies, has that changed in any respect?

A. No, there is nothing changed in that respect regarding the employment or service aboard the ships.

[fol. 113] Q. As to the settlement of disputes by the Port Committee, has that changed in any particular?

A. None whatever.

Q. Has there been any change within your knowledge of Section 1 of the contract, which provides: "The employers agree to recognize the Sailors' Union of the Pacific as the

representative for the purpose of collective bargaining of their unlicensed personnel"? I will ask you if in your knowledge there has been any change in that particular?

A. None.

The Court: The witness says that there has been no change in any of the essential particulars. Is that correct?

A. That is correct, your Honor.

The Court: The situation during the war was precisely the same in all essential particulars as it was prior to the war?

A. Exactly, sir.

The Court: A few little changes made on rate of pay and bonuses, and such as that, due to the increased danger arising out of the war?

A. That is right, sir.

By Mr. Peterson:

Q. Now Mr. Atkins, are you familiar with vessels that have been operated under what is known as a General Agency Agreement, commonly known as GAA 4-4-42?

A. Well, yes.

Q. You are familiar with that?

A. I am not familiar with the details behind that part of the directive, because I imagine it did not fall within our scope of operations.

Q. What I am asking you, however, has the union, within your knowledge, furnished employees, sailors, for vessels that are being operated under what is known as General Agency Agreement, GAA 4-4-42?

A. I believe that covers practically all the ships that we furnished men to.

[fol. 114] Q. Now, when you referred to steamship companies, has that included what are called general agents?

A. They all fall within that scope, I believe.

Q. Now, this contract that you have identified here covers generally wages, hours and working conditions, and those wages, hours, and working conditions as prescribed in this agreement are the terms of the contract that you have tried to see that the union lives up to and that the various steamship companies live up to that are signatories to this agreement; is that correct?

A. That is correct.

The Court: Does that not get us right back to the General Agency Agreement now?

Mr. Peterson: Leads us back to the General Agency Agreement, yes.

The Court: Under the General Agency Agreement the general agent is specifically required to procure the personnel for the ship according to the methods followed before, and this contract here is the method that has been followed, so that the fact that they do do that is entirely consistent with the terms of the General Agency Agreement. The steamship company was required to do it. One of its duties was to go to the Sailors' Union of the Pacific and get these men. In other words, I think this all is determined entirely by the contract. The two contracts read together simply carry out what the witness is testifying to orally. I still insist that this Court must determine this question from the writings and not from the oral testimony. All right. Make up your record.

Mr. Peterson: You may take the witness.

Cross-examination.

By Mr. Wood:

Q. Mr. Atkins, did you understand that all ships during [fol. 115] the war had been operated under general agency agreements?

A. No, I couldn't positively state that all vessels were.

Q. I think you said that all the vessels to which you supplied the crews—

A. That is correct, as far as I know.

Q. You don't really know, do you?

A. Well—

Q. There may be some that are time-chartered vessels?

A. Yes.

Q. You would not know?

A. Yes, there are those exceptions when it is possible a ship might have been operated out from under it. That I would have no way of knowing. But they did fall within the scope of the agreement.

Q. Are you present when the articles are signed?

A. In most cases.

Q. Have you ever been present when the articles were signed of a time-chartered vessel?

A. Yes.



Q. Were you working with one of the shipbuilding companies for a while?

A. I was with Oregon Ship for a time.

Q. In the intervening period?

A. Yes.

Q. Now, you were with the Shepard Steamship Company, then, from '39 to '41?

A. Yes.

Q. Will you tell me briefly in what trade or route the Shepard Steamship Company operated vessels?

A. Intercoastal.

Q. And by Intercoastal what do you mean?

A. From the Atlantic to the Pacific and vice versa.

Q. Were they a common carrier?

A. Yes.

Q. With a common carrier certificate from the Interstate Commerce Commission?

A. Correct.

Q. And who owned the ships that they operated?

A. The Shepard Steamship Company or the Shepard-Morse Lumber Company. The technical point there, I mean—

Q. You mean the Shepard & Morse Lumber Company. Is that an affiliated company?

A. Yes, that is the same.

Q. And who solicited the cargo for those trips? I don't mean who generally. I mean was it done by the Shepard Steamship Company or their employees?

A. Yes, or their agents.

Q. Who received the earnings of the vessels?

[fol. 136] A. The Shepard Steamship Company.

Q. Who bore the losses of the vessels?

A. The Shepard Steamship Company.

Q. Did Shepard Steamship Company operate any vessels which it did not own during those years, but which it operated as an agent for the United States Government?

A. Not for the government, no.

Q. About how many vessels did Shepard Steamship Company have?

A. Well, they averaged about five. They owned five of their own and filled in with other ships at times.

Q. Where would they obtain the other ships?

A. Just on occasion by charters from other owners.

Q. Did you notice at the top of the articles who it specifies as owner in the case of a time-chartered vessel, or have you never looked?

A. Oh, yes; I am charged with looking, if there is any reason to believe that there is a doubt. However, in most cases there was none, because the Commissioner's office in this port, the United States Shipping Commissioner's office, functioned along certain lines that way and defined the policy of that office. And none of the articles changed in heading unless we were all notified. Very, very seldom anything like that happened.

Q. Do you know it to be a fact that if you had a time-chartered ship, a vessel owned by a private steamship company and time-chartered to the Government, the articles [fol. 116] would show the name of the owner of the vessel as being a private steamship company, would they not?

A. I am not certain as to whether they would in all cases or not, any more than the offices of the steamship company might be certified the same as merely offices of the Government during the war time period. However, that could be ascertained very easily from the Shipping Commissioner.

Q. Yes. Now, the date of that union agreement is something November, 1941, is it not?

A. Yes. There is two dates on the present one, but the original date is—the '41 date is the one on the—

Q. I will hand you here a document entitled "Agreement between the Sailors' Union of the Pacific and Steamship Companies in the Intercoastal and Offshore Trade and the Alaska Lines," dated November 4, 1941. Will you examine that.

The Court: Is this the original?

Mr. Wood: Yes, your Honor. It is a copy of the original.

. . . . .

The Witness: I assume now, because of the fact, your Honor this is the usual form that I find in the hands of company agents, regardless of who they are. It is very seldom—in fact, I think we are the only ones that put out the agreements in that book form.

By Mr. Wood:

Q. That Exhibit No. 1 is published by the union, is it not?

A. Yes.

The Court: You don't question that?

Mr. Hicks: No, as long as it is—that is another copy of the same contract.

The Court: Very well, it will be admitted that this is a true copy of the contract issued November, 1941.

Mr. Wood: I offer it in evidence

[fol. 117] Mr. Hicks: No objection.

The Court: It will be admitted.

Mr. Wood: Maybe it will save time if at this time we can offer Memorandum of Rule Adopted by the Port Committee of the Pacific American Shipowners Association and the Sailors' Union of the Pacific to Cover Continuous Cargo Work on vessels in Alaskan Ports, Subject to Approval of War Shipping Administration, which is dated January 30, 1943.

Mr. Hicks: We have no objection to either that exhibit or the other that counsel is about to offer, but I would suggest they be tied together.

Mr. Wood: I would just as soon tie them together.

The Court: All right.

Mr. Wood: They are amendments.

The Court: They are amendments to the contract of '41?

Mr. Wood: Yes. I don't know that they constitute all the amendments, but they are typical of the amendments.

The Court: Very well. They will be all admitted as one exhibit without objection.

(The copy of Agreement above referred to, together with the document entitled "Memorandum of Rule Adopted by the Port Committee" etc., was thereupon received in evidence as Defendant's Exhibit A.)

By Mr. Wood:

Q. Mr. Atkins, it is the master of a ship, is it not, who has the responsibility of rejecting a man that you might send down?

A. Well, the master is the supreme authority on the vessel, it is true. But, however, any mate on deck—I am speaking now in my department—

Q. Yes.

A. —any mate, whether it is the third, second or first mate, who has been left in charge, has the same authority while he is solely in charge. He is merely fulfilling his orders [fol. 118] and acting as—

Q. He is acting on behalf of the master?

A. On behalf of the master for the vessel.

Q. If a man was sent by your union office and came down to the ship and turned out to not be fitted for the job and he was sent back with a request for another man, that would be the master's responsibility, would it?

A. It would be, yes.

The Court: Was there any difference in that situation before the war and after the war?

A. None whatever, your Honor.

The Court: In other words, it has always been the function of the master to control that situation?

A. That is correct, legally under the law.

By Mr. Wood:

Q. Mr. Atkins, there is a strike at the present time, is there not, on the waterfront of the Seamen's Union? I mean you are not now supplying crews to any of the vessels, are you?

A. The Sailors' Union of the Pacific, as far as I know, officially ended their strike at twelve midnight last night.

Q. I am glad to hear that. But during the past few days there has been a strike?

A. There has for eight days, perhaps.

Mr. Peterson: I object to that, your Honor, as outside the scope of the direct examination.

Mr. Wood: No, because I want to ask who that strike has been against.

Mr. Peterson: Of what importance is that on this issue?

By Mr. Wood:

A. Who has the recent strike been against?

The Court: There might be a difference of opinion on that.

[fol. 119] Mr. Peterson: Well, I object to the form of it, your Honor.

The Court: That is calling for a conclusion of the witness as to who it is against. They are striking for higher wages, I understand. He may say it was against the steamship companies but I have read in the paper that it was against the Government.



By Mr. Wood:

Q. Well, who set the scale of wages for which the union is striking? Was it not the War Shipping Administration?

A. The way you put it it is very difficult to answer.

Q. Do you know? Maybe you don't know.

A. Yes, I do know.

Q. Was it not the War Shipping Administration?—

A. No.

Q. —that approved the scale of wages, and which for the time being was not approved by the War Stabilization Board?

A. The War Shipping Administration did approve the contract, the new contract, that was negotiated under the Labor Act by the Pacific American Steamship Owners Association and the Sailors' Union of the Pacific. Then, acting on behalf of the Government, since the emergency has not been declared off, the War Shipping Administration underwrote that contract for the Government insofar as it could. It developed that they couldn't.

Q. That has been the way with all wage increases during the war, has it not, the War Shipping Administration has underwritten them?

A. That has followed throughout all industry pertaining to the war effort.

Q. You have not actually taken part in any of these negotiations, have you, with the Pacific American Shipowners Association?

A. The last time I was on the negotiating committee was in 1938.

Mr. Wood: That is all.

[fol. 120] Redirect examination.

By Mr. Peterson:

Q. May I ask you a couple of further questions, Mr. Atkins. On vessels so far as the union organization is concerned there is first the Sailors' Union of the Pacific, which embraces all unlicensed personnel, unlicensed deck personnel. Am I correct in that statement?

A. That is correct.

Q. Now, is there a union that has jurisdiction over the galley crew?

A. Yes, in the Pacific American Steamship Owners Association, the old West Coast Marine Cooks and Stewards.

Q. The Marine Cooks and Stewards is the union that has jurisdiction over the—

Mr. Wood: May I make a suggestion to try to shorten the record? We are willing to stipulate that there were similar agreements similar labor agreements, entered into between the Pacific American Shipowners Association and the Marine Cooks and Stewards Union, and the Marine Firemen, Oilers, Watertenders and Wipers Union, and that the Shepard Steamship Company had subscribed to the Pacific American Shipowners Association; that these similar agreements were also entered into on about the same date. . . .

By Mr. Peterson:

Q. Mr. Atkins, to complete my query, there is one division called the Marine Cooks and Stewards, and there is a contract in existence between the Marine Cooks and Stewards and the various steamship companies. Do you know that to be a fact?

A. Oh, definitely. They are operating under it every day.

Q. Now, in addition to that, are there four other unions that have contracts with the steamship companies in the operation of vessels?

A. There are the Masters, Mates and Pilots, and the M.E.B.A.

[fol. 121] Q. The M.E.B.A.?

A. That is the Marine Engineers Beneficial Association.

Q. Which embraces the engineers on board the vessels?

A. Licensed engineers on board the ship.

Q. And then there is—

A. Then there is the A.R.T.A. or the A.C.A. I believe they renamed themselves the American Communications Association.

Q. They are the telegraphers?

A. Wireless operators.

Q. Radio operators on board the vessels?

A. Of Pacific American.

Q. And then there are the Marine Firemen, Oilers and Watertenders?

A. Yes.

Q. And then the Masters, Mates and Pilots; is that correct?

A. That is correct.

The Court: Are you willing to admit all these in evidence?

Mr. Wood: No, I would rather not, your Honor. The thing is they incorporate amendments without showing that those amendments have been made and signed by the War Shipping Administration.

The Court: They are not official documents. In the face of a technical objection, they are not admissible.

Mr. Hicks: They have not really officially been offered yet, your Honor. Maybe counsel would permit their admission upon the basis that these are the contracts which were placed aboard the vessel.

Mr. Wood: Who would place them aboard a vessel?

By Mr. Peterson:

Q. I will ask you, then, if within your knowledge there are contracts with other unions?

A. Oh, very definitely.

Q. Now, do you know whether a copy of the printed S. U. P. agreement that has been marked and introduced [fol. 122] in evidence here is placed on board every vessel?

A. It is.

Q. Do you know whether or not that is true as to the other contracts with other unions?

A. I have very seldom ever visited a vessel where there were not, and then only in the case when they were not available at the time. It is true enough we have been short of printed matter ourselves in certain instances.

Q. Did the union delegates under the contract have copies of the contract when they went on board a vessel or were selected as delegates?

A. If they don't they usually secure one before the vessel leaves.

Mr. Peterson: Yes. You may take the witness.

Recross-examination.

By Mr. Wood:

Q. When you say they were put aboard the vessel, you mean they were given to the union delegate who was the crew's delegate on the vessel. Isn't that what you mean?

A. That is correct. That is another part of my job, to see that he does have that.

Q. When you say they were placed on board the vessel, you mean you would see that the union delegate in the crew had a copy of that in his possession?

A. Yes.

The Court: The plaintiff in this case was a member of the Sailors' Union of the Pacific, wasn't he?

Mr. Hicks: Yes.

By Mr. Wood:

Q. When you say placed aboard the vessel you mean it [fol. 123] was given to the union delegate. Who gave it to the union delegate?

A. Well, in many cases I do, or whatever other official happens to visit the ship.

Q. You mean union official?

A. Yes.

Q. Yes.

The Court: You don't take care of these other unions or see that they get a copy, do you?

A. Not unless I have been asked as a particular favor by their officials, being going to the ship, you know, where perhaps they were not able to make it at the time.

The Court: But it was not part of your business; you just did it as an accommodation?

A. Just as an accommodation.

The Court: Do you know of your own personal knowledge whether on all these ships other—I am going to call them business agents or representatives for each union went on and delivered one of these books? Do you know of your own personal knowledge, or is it just a matter of practice that you are testifying to?

A. No, from both, you—Honor. It is a matter of practice, and, in fact, other unions charge their officials the same as mine does me, and only in cases where there was a shortage, or the man might forget to place it in his bag, in those cases the delegates from the various vessels usually go up to their own union and secure the agreements. They would be foolish to sail without it. . . .

Mr. Wood: I have no further questions.

Mr. Peterson: That is all, Mr. Atkins.

(Witness excused.)



FRED W. FINK, the plaintiff herein, was thereupon produced as a witness in his own behalf and, having been *durst* [fol. 124] duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hicks:

Q. Mr. Fink, you are the plaintiff in this case?

A. Yes, sir.

Q. Did you ship aboard the "Steamship George Davidson" on or about the 12th day of June, 1943?

A. Yes, sir.

Q. How did you obtain your employment in that connection?

A. Through the Sailors' Union of the Pacific.

Q. Did you obtain membership in that organization before securing employment?

A. Yes sir.

Q. Were you hired out of the Union Hall?

A. Yes, sir.

Q. You signed the articles on the 8th day of June, 1943. Right?

A. I believe that is right.

Q. And you did become a member of the crew on that vessel?

A. Yes.

Q. At the time you went aboard or in the course of the voyage were you shown or did you read a copy of the union agreement that was aboard the vessel? By that I refer to the union agreement which was in effect at that time between the Sailors' Union of the Pacific and the Shepard Steamship Company.

A. There was a union agreement aboard the ship. I had seen it, but I didn't read it thoroughly.

Q. You didn't read it?

A. No.

Q. Where did you sail from?

A. From Portland, Oregon.

Q. And just very briefly into what waters?

[fol. 125] A. We went from Portland to San Pedro, from San Pedro to Hobart, Tasmania, and from Hobart to Bombay, from Bombay to Cochin, India, and from Cochin to Colombo, Ceylon, and from Colombo we went to Freemantle,

Australia, from Freemantle to Panama and from Panama to New York, and from New York to Baltimore.

Q. While engaged in that voyage did you sustain certain injuries which are more specifically alleged in the complaint on file in this case?

A. Yes, sir.

Q. Mr. Fink, did you come to know the master of the vessel?

A. Yes.

Q. Did you have conversations with him from time to time?

A. Yes.

Q. Was that true likewise of other officers and licensed personnel aboard the vessel?

A. Yes, sir. \* \* \*

Q. In the course of your relationships on this voyage and otherwise did you have any contact directly or indirectly with anyone representing the War Shipping Administration of the United States?

A. No, sir.

Q. By whom were you paid?

A. I was paid by the captain of the vessel.

Q. In what manner?

A. In cash.

Q. Were any checks ever furnished you?

A. Not me.

Q. Were any checks furnished your wife, to your knowledge, in the form of allotments?

A. I understand she received her allotment check—allotment by check.

[fol. 126] (A document entitled "Seaman's Allotment Note" was thereupon marked Plaintiff's Exhibit 2 for identification; and statement of wages and overtime was thereupon marked Plaintiff's Exhibit 3 for identification.)

Mr. Hicks: It has been agreed heretofore that this may be received in evidence and that it is what it purports to be.

The Court: That is a copy of the allotment slip.

Mr. Wood: Yes, no objection.

(The allotment slip above referred to was thereupon received in evidence as Plaintiff's Exhibit 2.)

Mr. Hicks: And the same will be true of Plaintiff's Exhibit 3. It has been stipulated and agreed that this may be received in evidence.

(The document referred to was thereupon received in evidence as Plaintiff's Exhibit 3.)

The Court: Now, there can't be any question about these allotment checks. Were they sent out by the Maritime Commission or by the Shepard Steamship Company?

Mr. Wood: They are sent out by the Shepard Steamship Company out of a special account of moneys supplied by the War Shipping Administration.

The Court: Yes. The War Shipping Administration furnished the money, but the Shepard Steamship Company sent their checks on this account to the wife?

Mr. Wood: Yes, that is right.

By Mr. Hicks:

Q. Mr. Fink, did this ship, the "George Davidson," fly a flag carrying any names or a name?

[fol. 127] A. No.

Q. Did the name Shepard Steamship Company appear at any place on the vessel, either by way of a flag or other designation?

A. No.

Q. Were any communications of any kind which you received in respect to your employment signed by any firm or person other than the Shepard Steamship Company?

A. No.

Mr. Wood: You say "Were any communications he received signed by others." Did he receive any communications?

By Mr. Hicks:

A. Did you receive any communications or have any documents handed you in respect to your work aboard that vessel which bore a designation other than Shepard Steamship Company?

A. No.

The Court: The question is did you ever receive any communications or documents during your service?

A. No.

Mr. Wood: I object to any oral testimony about written communications.

The Court: He says he never received any documents or anything of that kind.

By Mr. Hicks:

Q. You did receive Exhibit No. 3, did you or did you not?

A. Yes, I received that when we paid off.

Q. Now, my question was directed as to whether you received other documents of any form which bore the designation Shepard Steamship Company.

A. I don't know whether my discharge has the Shepard Steamship Company signature or not to it.

[fol. 128] Q. When you were notified through the hiring hall that you were to become a member of the crew of the "George Davidson" were you told by anyone as to what firm was operating that ship?

A. No.

Q. You were not told the name of the ship?

A. Not until after we had signed the articles.

Q. You didn't know the name of the ship until after that?

A. Well, we knew the name of the ship, but we didn't know the name of the company that was operating the ship.

Q. Have you at any time seen a copy of an agreement which is known as GAA 4-4-42; the General Agency Agreement?

A. No, I have never seen that.

Q. Did you see that before you shipped?

A. No.

Q. Have you seen it at any time?

A. No.

Q. Had you ever heard of such an agreement?

A. No, I had never heard of it.

Mr. Hicks: That is all.

Cross-examination.

By Mr. Wood:

Q. Mr. Fink, do you have your discharge from the vessel, your discharge slip?

A. I don't have it with me. I believe Mr. Hicks has it.

Mr. Peterson: Here it is, or a copy of it (handing document to counsel.)

Mr. Wood: Just to save time, I will offer his discharge in evidence. It shows that it is signed only by the master of the vessel, and does not have the name of the Shepard Steamship Company any place on it.



[fol.129] Mr. Hicks: We have no objection to it being received.

The Court: It will be admitted.

(The certificate of discharge above referred to, so offered, was thereupon received in evidence as Defendant's Exhibit B.)

By Mr. Wood:

Q. When you were sent down to the ship by the union did you know it was one of the government owned ships?

A. No. \* \* \*

Mr. Hicks: We will stipulate with counsel, if that is what he wants, that there was a suit pending in the United States District Court heretofore under the Suits in Admiralty Act, and that case was dismissed without prejudice; if that is what you want, we will so stipulate.

Mr. Wood: On account of the same matters and things alleged in this action.

Mr. Hicks: The same injuries involved, yes.

Mr. Wood: I think that stipulation is satisfactory.

The Court: All right.

Mr. Wood: Maybe it will shorten the matter. I will ask if you will make the same stipulation, that likewise a claim against The United States of America was filed pursuant to—

Mr. Hicks: We will admit that at one time, pursuant to the terms of Public Law 17, the so-called Clarification Act, a claim was filed and that thereafter a suit was filed against The United States in the United States District Court. We will stipulate to that effect, denying meanwhile that it has any bearing whatsoever upon any issue here.

Mr. Wood: But you will stipulate that a claim was filed before the War Shipping Administration, Washington, D. C., in the matter of the claim of Fred W. Fink against the [fol.130] War Shipping Administration, "SS George Davidson," and Shepard Steamship Company, a corporation, said claim being for the injuries received on the "George Davidson" which are the subject of this action, and the said claim being filed pursuant to Public Law 17 and the applicable general orders of the War Shipping Administration?

Mr. Hicks: We will stipulate to that effect, and denying its relevancy here.

The Court: All right.

Mr. Wood: Satisfactory. That is all, Mr. Fink. Thank you.

(Witness excused.)

Mr. Hicks: We desire at this time, your Honor, to offer in evidence a copy of the Agency Agreement designated as GAA-4-4-42. \* \* \*

Mr. Wood: I am further willing — stipulate, if counsel desires, that the vessel "George Davidson" was allocated to the defendant Shepard Steamship Company pursuant to the terms of such general agency agreement.

Mr. Hicks: We will so stipulate.

(The copy of document entitled "GAA 4-4-42, Contract WSA-215," so offered, was thereupon received in evidence and marked Plaintiff's Exhibit 4.)

Mr. Hicks: I desire at this time to offer in evidence a contract between the Pacific American Shipowners Association and National Marine Engineers Beneficial Association, CIO. \* \* \*

(The agreement above referred to, so offered and received, was thereupon marked Plaintiff's Exhibit 5.) \* \* \*

Mr. Hicks: I believe we rest at this time. We may have a few tag ends to offer later, your Honor, but at this stage of the case we will rest.

The Court: Very well.

[fol. 131] Mr. Wood: May I have the remaining exhibits?

Mr. Hicks: Your Honor, if I may intrude here, there were certain agreements which it was agreed might be received in evidence when we could establish fully the accuracy of copies, after counsel had examined them, and so forth. I think probably the agreements to which reference is made should be stated in the record so there will be no confusion about them.

The Court: Very well. \* \* \*

Mr. Hicks: Exhibit 9 for identification being an agreement between the Marine Cooks and Stewards' Association of the Pacific Coast, C. I. O., and Steamship Companies in the Intercoastal and Offshore Trade," etc. \* \* \*

(The agreement last referred to was thereupon marked Plaintiff's Exhibit 9 for identification.)

Mr. Hicks: In respect to those agreements we are to supply copies which counsel shall approve as to their accuracy.

The Court: Very well.

Mr. Hicks: Or otherwise originals.

The Court: All right.

Mr. Wood: In regard to what counsel just said, I see there are some of those which were to be received in evidence when authenticated copies are supplied, and I think there may have been more just now marked, but I think the record will show, or the previous record, and discussion on this.

The Court: Very well.

Mr. Wood: The defendant will now offer War Shipping Administration Operations Regulation No. 1, dated in Washington May 25, 1942 which for convenient reference may be found as Defendant's Exhibit 25 in the transcript of record in the case of Hust against Moore-McCormack Lines, Inc., in the United States Supreme Court, commencing at page 164 of said transcript, and ending at page 173 of said transcript.

The Court: It will be admitted, and it may be understood that a copy may be made and substituted for this transcript.

Mr. Hicks: No objection.

Mr. Wood: Just to make the record clear, I will identify it at this point as being the War Shipping Administration's Operations Regulation No. 1, in which they attach various statements of policy entered into between the War Shipping Administration and the various unions, together with some clarifying correspondence between the War Shipping Administration and union officials.

The Court: You offer all of that as the exhibit, not only their own statement, but the statement of policy and other exhibits?

Mr. Wood: Yes.

The Court: Very well. It will all be admitted, with the understanding that copies will be made from this original transcript.

Mr. Wood: Yes.

(The copy of the document above referred to, so offered, was thereupon received in evidence as Defendant's Exhibit C.)

Mr. Wood: The defendant will now offer in evidence War Shipping Administration's General Order No. 21, which is codified in the War Shipping Administration's general orders as General Order No. 21, Part 306, General Agents and Agents, Chapter IV, War Shipping Administration, Title 46—Shipping. I believe it is only necessary to offer the first page of this General Order No. 21 and Sections 306.46, headed "Berth Sub-Agent Service Agreement," together with Form BSA, approved 9/22/42 and attached thereto, [fol. 133] and Section 306.47, "Appointment of Berth Sub-Agents," and I will ask the court reporter to have copied for us those stated pages of this General Order No. 21.

Mr. Hicks: We do not object to the identification or accuracy of the material that counsel now offers. Our objections is, however, that it is incompetent and irrelevant and without bearing upon any issue in the case.

The Court: I will admit it subject to the objection.

Mr. Hicks: No foundation laid. . . .

Mr. Hicks: As I understand it, you received it over my objection.

The Court: Yes. You are willing that he should just take the excerpts out of there that he offered.

Mr. Hicks: Yes, your Honor.

The Court: Very well.

(The excerpts from General Order No. 21 above referred to were thereupon received in evidence as Defendant's Exhibit D.) . . .

Mr. Wood: We will ask the court reporter to copy the correspondence which is the appendix to this brief.

(The appendix to the brief above referred to, so offered, was thereupon received in evidence as Defendant's Exhibit E.)

Mr. Wood: Now, I want to also offer in evidence, although I do not have either the original or a copy with me right here at this time, and I want to have received in evidence the shipping articles from the office of the United States Shipping Commissioner, which were signed by the master of the vessel and signed by Mr. Fred Fink, covering the engagement for this particular voyage.

The Court: I think they are material and they will be received.



Mr. Hicks: We have no objection to counsel furnishing a copy of all or a part of the articles by photostatic copy or otherwise.

[fol. 134] Mr. Wood: I think we can get a photostatic copy.

The Court: Very well. They will be admitted.

(The copy of the shipping articles above referred to, to be later furnished by counsel, was thereupon received in evidence as Defendant's Exhibit F.)

The Court: That is the shipping articles?

Mr. Wood: Yes, from the office of the United States Commissioner. We won't have any trouble in agreeing to that.

The Court: Very well.

Mr. Wood: Now I would like to call Mr. Sanders.

EARL SANDERS was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wood:

Q. Where do you reside, Mr. Sanders?

A. In San Francisco.

Q. What is your occupation?

A. I am the California operating manager for Shepard Steamship Company.

Q. At the present time are you acting in the capacity, although without the official title, of manager in the Pacific Northwest?

A. Yes.

Q. How long have you been with the Shepard Steamship Company?

A. Well, I was about two years, from '39 to '41, and then again from '42, the summer of '42, until the present time.

Q. What did you do in the intervening period?

A. Well, I worked at various things, both here and up in [fol. 135] Seattle, in steamship work, a number of things.

Mr. Wood: I think that is certainly true. Of course, the government doesn't always act the way private people do, and I don't think Mr. Settle says that the War Shipping didn't have power to go and do it directly, but as their usual procedure, the way they did it, they would tell the agent what they wanted done.

The Witness: I can't say they never did do it, your Honor. It is the policy to go through channels, the same as it is in the Army.

[fol. 155] By Mr. Wood:

A. Now, what do you do generally with regard to keeping track of the vessels when they are in port?

A. Well, we have a department that keeps track of the arrivals, all arrivals in port, and all departures each day, and this report goes on my desk and the others, and shows the name of the agent, the dock, and by that report we keep in contact with the agents. I don't think there are very many that they don't call us every day regarding some of them, some part of the operation of these vessels.

Q. Who has authority to make decisions when problems like that arise?

A. Well, we are supposed to make decisions in regard to our experience, based on our previous steamship experience.

Q. You say based on your previous steamship experience. Have you had previous steamship experience, Mr. Settle?

A. What is that?

Q. Have you had previous steamship experience?

Q. Oh, about forty years.

Q. And is that also true of other employees of the War Shipping Administration in similar capacities?

A. Yes, all of our employees have been engaged by reason of their experience, the M & R and the auditors.

The Court: I am glad to hear that the government, in creating a few, at least, of the innumerable bureaus it created, has taken into account experience as a qualification for appointment. The War Shipping Administration seems to be an exception to the general rule.

A. If I might interrupt, I think this is—when you stop and consider that it was a big job to handle maybe forty or fifty ships by one company before the war, you can imagine what a job it is to handle more ships than there was in the entire world during the war.

Q. And those ships were operated by them for their own account?

A. Yes.

By Mr. Wood:

Q. Did Shepard Steamship Company operate in any foreign services or to any foreign ports?

A. No, they did not operate on their own. On one or two occasions they time chartered other vessels into another service, or someone else's service; where they just handled the vessel.

Q. With another private steamship Company?

A. Yes; the Grace Line, for instance, one occasion that I know of.

Q. Did they ever operate vessels to Australia or the far Pacific or to India, to your knowledge?

A. Not to my knowledge, sir, during the time—

Q. Now, are you familiar with the vessel "George Davidson"?

A. Yes.

Q. It has already been stipulated that that vessel was allocated to the Shepard Steamship Company under a [fol. 137] general agency agreement. Do you know who owned that vessel?

A. The United States Government.

Q. Do you know where the vessel was built?

A. Oregon Ship.

Q. Do you know who built it?

A. Well, it was built by Oregon Shipbuilding Corporation for the account of the United States Maritime Commission.

Q. Now, I would like to take you briefly over the services that you rendered in connection with that particular vessel from the time that the vessel was completed until it made its voyage. In the first place, would the services for that vessel be rather typical of the services that you generally render as general agent?

A. Yes.

Q. For other government owned vessels?

A. Yes.

By Mr. Wood:

Q. Now Mr. Sanders, what would be one of the first tasks of a general agent in connection with a newly built ship allocated to it?

A. Well, one of the first things would be to get a master of the ship assigned to it.

Q. How would you get a master?

A. Well, we would be supposed to know some of them. That is what they have us for. But otherwise we would contact the Masters, Mates and Pilots Association. Or in a case of too many shortages we went to the War Shipping Administration, through their Recruitment and Manning organization.

Q. Can you tell us just briefly, if you know, what the RMO of the War Shipping Administration was?

[fol. 138] A. Recruitment and Manning organization. That is the name of it.

The Court: They conducted schools, didn't they?

A. They had recruitment organizations scattered throughout the country. They had, I believe, a school for raw recruits at Catalina Island, and an upgrading school for officers at Alameda, that I know of.

Q. Will you tell also something of the pools maintained by RMO in foreign areas.

A. All I know is that in some cases when we had shortages on ships in foreign areas—forward areas—and men would get off and they would come back with the full complement, and we would find out where they got them; they got them from pools of the War Shipping Administration. But the details of foreign areas we didn't know very well.

Mr. Wood: Now I will hand this form to the witness. I will ask to have it marked for identification so we can refer to it.

(The form referred to, entitled "War Shipping Administration, Division of Operations, Service Record," was thereupon marked Defendant's Exhibit G for identification.)

Q. Referring to Defendant's Exhibit G for identification, was that form used in connection with the procurement of a master?

A. Correct.

Q. Will you state what the form was used for.

A. This is a service record used for all licensed officers,



under instructions of the War Shipping Administration, to present their name, with all the data required on here, such as education; and so on, issue and license numbers, and on the back the particulars of previous sea service, which [fol. 139] was sent then to the War Shipping Administration for their approval.

Q. Now, you would have a master or other officer fill that out, would you, Mr. Sanders?

A. Correct.

Q. And then who in the War Shipping Administration would you send that to?

A. In this Coast I think they all at all times went to the District Marine Superintendent in San Francisco.

Q. That is Mr. George Eggers. He was the War Shipping District Marine Superintendent?

A. Yes.

Q. Then would you receive his approval of the engagement of the master?

A. Yes.

Q. Following that. And was the same procedure also followed with respect to other licensed officers?

A. Yes.

Q. The chief engineer, chief mate—

A. Yes.

Mr. Wood: I offer that form in evidence.

Mr. Hicks: Your Honor, I don't think we have any objection to this document.

The Court: Very well. It will be admitted, then, without objection. It is not a part of your offer of proof, but is in the record.

(The blank form above referred to, so offered, was thereupon received in evidence as Defendant's Exhibit G.)

By Mr. Wood:

Q. What would be the procedure, Mr. Sanders, in respect to a master who had previously filled out one of these blanks on another ship, with respect to employment on another [fol. 140] ship, when he sought employment on a new ship? Would he have to fill out this form over again?

A. Well, not necessarily. They have a transfer form, a much shorter form, simply stating that he had—well, you ask him if he has filled out—determine whether he has made one out for any agent on any War Shipping vessel. If he has, the requirements are simply then to make one of these transfer forms stating what his last employment was, what vessel it was, the name of the vessel, and to which vessel he is now going. That is just a statistical record.

Q. And that would be true if he had previously served on a vessel allocated to some other general agent?

A. Yes.

Q. Of the War Shipping Administration?

A. Yes.

The Court: Of course, they already have his statement of who he is and what he is, and all they would have to know then is if he is the same fellow.

Mr. Wood: That is true, but I wanted to make it clear.

The Court: This transfer blank would be submitted to the War Shipping Administration for their approval just the same, wouldn't it?

A. Well, they would serve this purpose: That if in the course of events—they apparently had many personnel problems, and they would find a man that they determined to be incompetent, or for some reason that they didn't want him hired—didn't want to hire him as a master; possibly would use him as a mate. And when this transfer form came through—he may have been ashore for six months or two months or something, and when it came to their attention [fol. 141] they could advise us not to use him because of something that happened in the meantime.

The Court: Then you would go and get another one and submit to them?

A. Yes. We never have had that happen, but that is the purpose of it.

The Court: The use of the transfer form was just because he had already filled out an application as to what his education was, what his service had been, and such as that, and as I understand it would be a mere idle gesture to go and fill the same thing out again. He would just say, "Well, I have served on a boat for the McCormack people," we will say, on a given ship. "Now I want to transfer over to so and so ship." And that is submitted to the War Ship-

ping Administration as to whether to approve him for this ship or not; isn't that correct?

A. Yes, it is supposed to be approved.

Mr. Wood: The significance of it from my point of view is that if he has worked for the War Shipping Administration, even on another agent's ship, my contention is it shows that he is still working for the War Shipping Administration all the time and he doesn't have to make out a new form.

The Court: The way I gather it is this: If he makes out one form and is accepted by the War Shipping Administration as a master of a ship, and then he finishes that tour of duty and he goes on another ship, why should he make out another report to the War Shipping Administration or go to them for approval, if he has already been their employee and they have his record and everything. They have employed him once. Why not transfer him to another ship just ipso facto without any trouble.

Mr. Wood: That is exactly it.

[fol. 142] The Court: I think that that situation disputes your contention, because if a man goes into the Navy he becomes a member of the Navy. Now, every time he changes boats, why, they don't make him a new member of the navy.

Mr. Wood: That is right, because he has always worked for the United States Government.

The Court: A man's name is submitted to the War Shipping Administration for approval as a master under this agency agreement, and they approve him as all right to take that ship and go. Now, if he were owned by the United States Government and was their employee, and all of that, they why, when they want to send him to another ship, have to go through the same rigmarole?

Mr. Wood: They just have a transfer slip.

Mr. Hicks: Your Honor, the contract itself provides for that, inasmuch as the master must first be selected and approved by the general agent, and then only after the general agent has selected him may he be approved—

The Court: Anyway, it is a kind of double edged sword you are getting into right now.

Mr. Wood: Well, I think it is good for our side. I think our side is sharper.

The Court: All right.

By Mr. Wood:

Q. Now, having engaged the officers and the master, what are the next duties of a general agent with respect to a new ship? What else do you do now with the new ship?

A. Well, of course, this all overlaps.

Q. It all overlaps; you don't do everything simultaneously, but what other duties do you perform?

A. We work in conjunction with the building yard to determine, if we can, when they are going to deliver it, and [fol. 143] how completely they are going to deliver it. Then another question is as to the minimum stores they put on and various other things. And the master then takes his officers and whatever he thinks is necessary in attendance down there during the building the latter few days. The entire licensed personnel is employed previous to the delivery in accordance with a prescribed schedule of days that the War Shipping Administration will allow for the men to be on the payroll.

Q. Who prescribes that?

A. I believe in most cases that has come from Washington to us through our New York office.

Q. From Washington; you mean by the War Shipping Administration?

A. By the War Shipping Administration.

Q. The Shepard Steamship Company has no office in Washington, has it?

A. No, through our department—

Q. When you talk about Washington you are talking about the head office of the War Shipping Administration?

A. Yes.

Q. Then is there an inventory of stores taken?

A. Yes. That time is eventually set by the Maritime Commission. Of course, they maintain a staff at these yards, and they set a time for an inventory—a joint inventory between the building yard, the Maritime Commission, and the War Shipping Administration, represented by our—or the vessel's officers.

Q. Then about this time I suppose you receive some instructions as to the allocation of the vessel's space for cargo?

A. Usually about the time that a vessel is due for delivery, why, they begin to get busy on just what they are going to do with the vessel.



Q. Now, I will hand you two letters on the letterhead of the War Shipping Administration, address 200 Bush Street, San Francisco, California, one dated May 24, 1943, and one dated May 25, 1943, on the subject of "SS George David-[fol. 144] son," and ask you to examine them.

A. Yes.

Q. Were those letters received in the Portland office in the regular course of business?

A. Yes.

Mr. Wood: I will offer them in evidence.

The Witness: The receiving date is stamped on there.

Q. The date that is stamped in red is the receiving date?

A. That is the date they are received in our office.

Mr. Hicks: We have no objection to the exhibits.

The Court: Those will be admitted and become a part of the record and not as a part of your offer of proof.

Mr. Hicks: Yes.

Mr. Wood: I would like at this time to ask also that a letter of May 22 on the same subject, also from the War Shipping Administration to the Portland office of the Shepard Steamship Company, be also received in evidence. It was exhibited to counsel with these other letters yesterday afternoon, but apparently inadvertently left in Mr. Sanders' office.

Mr. Hicks: No objections.

The Court: Very well. They will be admitted in evidence as a part of the record in this case, and not as a part of your offer of proof.

(The three letters above referred to, dated May 24, 1943, May 25, 1943 and May 22, 1943, respectively, so offered, were thereupon received in evidence as Defendant's Exhibit II.)

By Mr. Wood:

Q. Now I note, Mr. Sanders, that in those letters it is stated in a general way what service the vessel is to be operated in. Did Shepard Steamship Company have anything at all to do with determining where the vessel was to go?

[fol. 145] A. No.

Q. Or in what service it would be operated?

A. No.

Q. Are you familiar with the procedure under which the vessels at that time were allocated for particular services? In other words, to make myself more specific, are you familiar with the general procedure by which in San Francisco there were representatives of the Army and Navy?

A. Well, yes. Apparently they had some kind of—well, at various stages of the development in cooperative committees between the military and the War Shipping Administration and from this Allocations and Assignments office we got the eventual answer to—not where the ship was going. It was an extraordinary case for them ever to tell us where the ship was going. This did not happen to be military cargo. We went to the Army and Navy and they just told us that we would deliver the ship to the Army or the Navy at a certain place period.

A. This was not an Army or Navy assignment?

A. This, I believe, was lend lease, British Ministry or War Transport, or whatever they call it.

Q. So at any rate all you knew about it was what you were told by the War Shipping Administration?

A. That is correct.

Q. Now, what duties, if any, would you have with respect to the loading of cargo for the vessel?

A. We have nothing to do with that under this particular instance.

Q. What duties would you have with respect to soliciting cargo or finding cargo for the vessel?

[fol. 146] A. There was no such thing.

Q. What duties did you have with respect to collecting freight for the vessel?

A. Well, there was no freight—there is no freight involved. If there was, we wouldn't have anything to do with it anyway.

Q. Yes. Who would?

A. Well, that gets into many, many phases of the General Order 34. It would depend a great deal where it went and how it went; but in the ordinary case, if there had been any commercial shipments, it was provided under the berth agency arrangement that the berth agent would bill the ship, manifest the ship, make any collections of freight, and settle claims.

Q. Did Shepard Steamship Company ever act as berth agent, as far as you know?

A. Well, we have since the war through different—

Q. Since the end of hostilities?

A. And I could not be sure whether we ever did. We might have in an isolated case here and there.

Q. Were you qualified to act as berth agent on the run made by the "George Davidson" under the rules of the War Shipping Administration?

A. No, not in that case.

. . . . .

JOHN C. SETTLE was thereupon produced as a witness in behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wood:

Q. Where do you reside, Mr. Settle?

A. In Portland.

Q. Have you resided here for many years?

A. Oh, some twenty-odd years.

[fol. 147] Q: What was your position with the War Shipping Administration?

A. Administrative assistant.

Q. In what office?

A. In the War Shipping Administration, Portland; and similar positions with the Maritime Commission.

Q. Similar in the Maritime Commission since—

A. Since September the 1st.

Q. Of this year?

A. Yes.

Q. When the War Shipping Administration was dissolved?

A. Yes. It was dissolved on September the 1st.

Q. Mr. Settle, will you explain just in a general way the organization of the War Shipping Administration; that is, how it operates with field offices and divisions, and so forth.

A. Well, the actual operation of the vessel has been entrusted to agents who have been appointed under the GAA

contracts for the reason that the amount of work involved was so immense it was impossible for one organization to handle the entire matter.

Q. What I want you to do is explain the organization of the War Shipping.

A. Well, the War Shipping Administration, as I understand it, was set up by executive order in the President's office to act as an operating agent for all of the vessels which were requisitioned and which were built during the war.

Q. And its head offices are in Washington?

A. The head offices are in Washington.

Q. You have never been through the head offices in Washington, have you, Mr. Settle? Have you ever been back there to Washington?

A. Yes. The War Shipping and the Maritime Commission are acting under the same administrator.

Q. Now, what branch offices are there on the Pacific Coast?

[fol. 148] A. Well, there is a branch office of the War Shipping in every port on the Coast of any consequence: Seattle, Portland, Los Angeles, San Diego, and they also have field offices in all parts of the world.

Q. How large an office is in Portland, how many personnel?

A. Well, in our office, which might be called an operating division, there are fifteen to seventeen people ordinarily.

Q. Does that include the Maintenance and Repair Division?

A. No, the Maintenance and Repair Division—that is another operating arm of the War Shipping. They have—I would not be able to tell you. They have a number of surveyors and clerks, personnel.

Q. Are you now talking about in Portland?

A. In Portland, yes.

Q. Do you know whether the same is true at other ports?

A. In every port, yes. They have the same setup.

Q. The auditing for this area is done through the Seattle office, is it not?

A. No, we have a local auditor here who audits the voyage accounts of all vessels; expenses.

Q. Is that auditor's office included in the personnel that you mentioned, being about fifteen?

A. No, that is separate.



Q. That is another separate office?

A. Separate office.

Q. Is there an RMO organization in Portland, or was there during the war?

A. We had a Recruiting and Manning Organization all through the war, but it has been discontinued.

Q. Did they have representatives in Portland?

A. Yes.

Q. Was that a separate branch of the WSA?

A. They had separate offices in the Lewis Building.

[fol. 149] Q. Now, I just want to ask you about some of the functions which your office and those other offices of the WSA here in Portland performed with respect to the operation of vessels during the war period. Did you, for example, have anything to do with getting docks for the vessels?

A. Well, we have helped agents acquire docks for vessels when they arrived; also when they are moved around in port.

Q. When you say "agents" who do you mean?

A. Well, our general agents who are employed to handle the operation of the vessel are subject to our orders.

Q. Now, how about the loading and discharging of ships. What do you have to do with the loading and discharging of ships?

A. Well, we received, usually, a wire from our San Francisco office when the vessel is coming to Portland, and we immediately so advised the general agent or the berth agent, and advised him what his program will be while he is in port.

Q. And does the War Shipping Administration have a contract with the stevedoring company that does the loading of the vessel or the discharging?

A. Yes, we have what is code named War Ship Stev.

Mr. Hicks: Maybe we can shorten this by the stipulation that on counsel's representation that in certain instances there were contracts between the stevedoring companies and the War Shipping Administration—if he says that is true, we will stipulate that is true. We don't understand it to be true in all cases, but that there were in effect certain contracts whereby the stevedoring companies had

contractual relations with the War Shipping Administration. Is that what you want?

Mr. Wood: I think it is in practically all cases. I will ask Mr. Settle about that.

[fol. 150] Q. Was practically all loading and discharging of vessels done under War Ship Stevedoring contracts with the WSA?

. . . . .

A. They didn't in every case. Oftentimes the vessels were allocated to the Army or the Navy, and they would have their own stevedoring contracts.

Q. The Army and Navy had their own?

A. But if it was War Shipping entirely or lend lease then the War Shipping performed the stevedoring under their own stevedoring contracts.

Q. I think that is clear. Now I want you to describe the procedure with respect to the repair of vessels and the function of the M & R Division in getting ships repaired. Will you describe that procedure.

Mr. Hicks: You mean in this harbor of Portland?

Mr. Wood: Well, all right, in this harbor; and then, if he knows, generally.

A. Well, the general practice in all ports, the War Shipping Administration has what they call a Maintenance and Repair Department, with a port agent, and he has under his control a number of surveyors and a clerical force to check on repairs and the apportioning of repairs to various shipyards in the area. So the matter of repairs is handled by the Maintenance and Repair Department. The agent makes his report when the vessel comes in, the voyage repairs needed.

Q. You say the agent. To make it specific, the general agent makes some report?

A. The general agent through his engineer that is on board the vessel states that the vessel requires so much repair in the engine room, and the deck department so much on deck.

[fol. 151] Q. I want to be specific about that. Is it the engineer that makes the report?

A. Well, the captain submits the report, ordinarily. It might be through the port captain, but the combined report

of the voyage—the report is submitted from the ship through the captain ordinarily to the M & R—through the general agent who represents it to the M & R, and they handle it with the repair yards.

Q. In other words, the captain of the ship gives the report to the shore side personnel of the general agent, and the general agent transmits it to the M & R; is that it?

A. Yes.

Q. And then what does the M & R do?

A. The M & R—during the war when it was not possible to secure bids, they gave it to whatever yard could take the job.

Q. And who selected the yard to do the job?

A. The Maintenance and Repair Department.

Q. Who let the contract?

A. Well, probably it was not what you might call a contract at that time, because it was a cost plus arrangement, undoubtedly, according to my understanding.

Q. And did the general agent make those contracts with the repair yards?

A. Well, the general agents do make minor—they have a limit as to what they can do. I think at one time if it was under five hundred dollars they could go ahead and have the work done on their own—on the voyage accounts.

Q. If it was under five hundred dollars the general agent could do it?

A. If it exceeded that amount it had to go through our Maintenance and Repair Department.

Q. Then who were the contracting parties for the repairs?  
[fol. 152] A. The repair yard—

Q. The repair yard on one side, and who was the other contracting party?

A. It would be—the War Shipping Administration would be.

Q. Now, are you sufficiently familiar with the organization of the War Shipping Administration to know whether or not it had a Labor Relations Department?

A. Well, we have no Labor Relations Board here.

Q. In Portland, no.

A. Not Portland. But I understand there is such in Washington, and we have a marine superintendent's office in San Francisco who has an experienced labor man on his payroll.

The Court: Let me ask you a question: Supposing a boat shipped out of New York which had been allocated to some steamship company that was general agent with headquarters in New York, and that general agent procured the master and the crew in New York for that vessel, and in the course of its travels the vessel came through the Panama Canal and came into the Portland harbor, what right of control, if any, did you have in connection with the personnel of that ship, representing the War Shipping Administration in this port? Could you go aboard that ship and fire any of those sailors?

A. Well, you say going through the Panama Canal. Now we did have cases of—

The Court: I don't care whether it went through the Panama Canal or whether it went around—

A. I am showing you where we maintained a pool of sailors and crew members down there in the pool, what we called the Panama Canal pool.

The Court: Wait. Maybe I didn't make my position clear. We will go back and start over again. Get away from [fol. 153] that pool business. Suppose a Liberty ship owned by the War Shipping Administration is assigned to a steamship company with its headquarters in San Francisco, and the ship is turned over in San Francisco and this San Francisco steamship company procures a master and procures all the seamen necessary to operate that ship at San Francisco, and that ship sails under the direction as to where it should go of the War Shipping Administration. Now that ship, in carrying out its business, comes into Portland harbor before it starts out across the Pacific or somewhere. Do you have any jurisdiction representing the War Shipping Administration over those seamen or over the master of that ship? For instance, representing the War Shipping Administration, could you go aboard that vessel and discharge either the master or any of the seamen?

A. The answer might be two or three ways on that question. The War Shipping Administration does not do business that way. We have channels, the same as they do in the government, and it would be through the general agent. If the captain was not satisfactory we wouldn't go down and fire him, but we would probably ask the general agent to fire him.



The Court: Then you never understood that as the representative in the local port of the War Shipping Administration you had any authority for any cause to go down and fire the master of the ship? You would have to go back through the general agent and complain to him and tell him to get us another master?

A. That is right; it would have to go through channels. It would not be proper or in order for us to go into the ship and fire anybody.

The Court: And it was your understanding that if it became a matter of discharging a master or any seamen that that was the business of the general agent, and if the situation required the discharge of the master or any of the other personnel on the boat that was the business of the [fol. 154] general agent to discharge them?

A. Well, those come up step by step, your Honor. In the engine room the chief engineer—it would go through him. If it was on deck it would go through the captain, and from the general agent to the captain, and all the way down.

The Court: That is what I mean. But of course the master of the ship has absolute control of the ship at sea. I suppose he can do a lot of things. But if the master was going to be discharged he would have to be discharged by the general agent, wouldn't he?

A. By the man that employed him.

The Court: That would be the general agent?

A. That would be the general agent.

The Court: I never saw in all these briefs or petitions or even in the evidence in the Hust case anything about that particular point being brought out. That is one of the best indications of employment, is the right to hire and the right to discharge, where that power lies.

Mr. Wood: It depends on for whom they are acting. If they are acting as agent in doing it, it comes right back to the same thing.

The Court: I know, but whenever a principal has an agent and the agent simply acts for and on behalf of the principal, certainly the principal can do anything that the agent can do. He doesn't have to have the agent do it. In other words, if I am the principal and you are my agent, and I put upon you certain duties to perform, I can turn around and say to you, "Well, I will do that directly." I don't have to ask you to do it for me.

The Court: There isn't any question about that. . .  
 [fol. 156] A. So it would require a modicum of experience.  
 The Court: They did a good job, too.

By Mr. Wood:

Q. Mr. Settle, you mentioned this pool at Panama. I would like you to explain this RMO pool arrangement.

A. Well, they had oftentimes had members of the crew abandon ship down in the Canal. They would get sick. And so they did establish what they called a pool down there. When vessels came through in order that they might be dispatched, why, they could draw from this pool to replace members of the crew.

Q. Who is it that established this pool?

A. Well, it came out of the Recruiting and Manning offices ordinarily. They were sent down there.

Q. That is what I mean. Did the general agents run this pool?

A. No, the War Shipping.

Q. Can you just give us an idea of the quantity of directives and policies and operating regulations that were issued by the War Shipping Administration covering operations of vessels?

A. Well, there are volumes and volumes of them, and it takes—we have quite a library, and to keep track of them—I know that they are there, and I know about where to find them.

The Court: It is not as bad as the OPA, though, is it?

A. No, we know where to find them, and we try to have a semblance of order.

By Mr. Wood:

Q. Do you function in interpreting those and instructing agents what to do pursuant to those regulations?

A. Well, in case of uncertainty on the part of the agent, he will call us and ask what is your opinion of this directive, or what should we do under these circumstances. It is our duty to give him an answer on it.

Q. Now, do the masters of vessels on occasion come to [fol. 157] your office with reports?

A. Yes, we quite often have the captain come in after they have been overseas, come in and report, give us a report.

Q. Now, supposing a crew member on a ship ships here in Portland and the ship goes out to Shanghai or some place, or before the end of the war it was some place like Sydney, and he gets sick and has to leave the ship? Who arranges for his repatriation?

A. Well, we have agents in these forward areas, and he applies to our nearest agent, who repatriates him to this country.

Q. Now what kind of an agent are you talking about there? You mean the War Shipping Administration?

A. War Shipping Administration representative.

Q. In other words, do you mean people on the payroll of the War Shipping Administration?

A. Yes. We have quite a large organization overseas in every principal port of the world.

Q. I just wanted to make clear what you meant by "agent," because we speak of general agents—

A. War Shipping agents; representatives. They are called port agents or port representatives.

Q. But they are individual men who are directly employed by the War Shipping, are they?

A. In a similar capacity to our office here, to perform the same duties.

Mr. Hicks: If your Honor please, I want to ask that the last two answers of the witness be stricken on the ground that this whole subject concerning repatriation and the transfer of a man back to his home port is governed by contract, and the contract is the best evidence. Were you through with the witness?

Mr. Wood: I am through with the witness.

Mr. Hicks: I want to ask him some questions in that connection.

Cross-examination.

By Mr. Hicks:

[fol. 158] Q. What is the fact, Mr. Settle, as to whether or not this subject of repatriating a crewman and obtaining his transfer back to his home port is governed by contract between the general agent on the one hand and the union on the other? Don't you know that to be true?

A. Yes, I believe that is true.

Q. Yes. So when you said that that was arranged through the War Shipping Administration, what you meant was that the War Shipping Administration had approved the contracts which had been negotiated between the general agents and the unions; is that correct?

A. Whether they had approved this contract? I wouldn't say as to that. I know prior to the war if a ship sank at sea and the men and sailors were all ashore on some island, there was no obligation on the part of the owner of the ship to bring them home. But I know that since the war the War Shipping Administration has been leaning over backward in their efforts to take care of injured men and furnish them the very best of food and conditions under which to work.

Q. Yes, but am I correct that with respect to these various contracts—

Mr. Wood: Let's refer to the specific clause, Mr. Hicks, if you are talking about a clause in the contract.

Mr. Hicks: If you will refer to Plaintiff's Exhibit No. 1, Section 19, page 5.

Q. Now Mr. Settle, will you kindly refer to Plaintiff's Exhibit 1, to Section 19 thereof, and state whether or not that is the basis and the procedure under which the repatriation and the transfer is effected of a crewman back to his home port?

A. Well, this has reference to men discharged on account of layup of a ship, who has been employed fifteen days or less, shall be given immediate first class transportation.

Q. By whom?

[fol. 159] A. By the War Shipping Administration eventually.

Q. Now, that contract that you have there is between the union, the Sailors' Union of the Pacific, and the general agent.

Mr. Wood: I think it is only fair to the witness—I don't know if he knows it—to point out the statements of policy; that the War Shipping Administration and the union adopted this as a working agreement between the WSA and the unions.



By Mr. Hicks:

Q. Just to make it short, Mr. Settle, it has been your understanding as an executive of the War Shipping Administration in the local field that the repatriation or transfer of crewmen back to the home port, and that sort of thing, was always governed by contracts entered into between the unions and the general agents, the operating companies, which contracts were approved by the War Shipping Administration?

A. I don't say always, no, because how long has this contract been in existence?

Q. From 1941 on.

A. Yes. But was it prior to that? I doubt it.

Q. I am referring to the period of the war.

A. Well, the period of the war, these conditions were with the approval of the War Shipping Administration.

Q. Yes. But the obligations related as between the union and the general agents who were bound to perform those things which the contracts provided they should perform; right?

A. Yes, as approved by the War Shipping Administration.

Q. Yes, I understand. Now, the general agency agreement refers to voyage repairs. Could you give us a definition of voyage repairs, Mr. Settle?

A. It is repairs that have become necessary on account of things that have happened during that voyage. It might [fol. 160] have been a breakdown of a winch, or wear and tear in the engineroom or the breakdown of something in the engineroom, or it might be an accident; a wave might have hit the vessel and created some damage, navigational hazards.

Q. Does voyage repairs likewise refer to repairs which are necessitated while a voyage is in process, while a ship is under way at sea?

A. During the last voyage, yes.

Q. Yes. Well, supposing a ship is out in the middle of the ocean and certain repairs are necessitated while the ship is still at sea. Are those voyage repairs?

A. Oh, those are immediate—for the safety of the vessel, you mean?

Q. Yes.

A. Those become—they would if the vessel had come to

Marine Cooks and Stewards in San Francisco, and if I am [fol. 176] not mistaken one of the mess boys on the "Sea Thrush" was fired in San Francisco.

Q. Can you remember any other occasion?

A. It is pretty difficult to answer that kind of question, because there is hundreds or thousands of these cases, and I don't keep track of them individually. I have got a stack that would fill this room.

Q. That is the only occasion—

A. And I remember this very specifically, because at that time there was trouble on the waterfront, and that kind of refreshes my mind.

Q. You remember the Shepard Steamship Company firing a man?

A. I remember that, yes.

Q. Can you remember any other occasion when Shepard fired a man?

A. Well, I don't know Mr. Shepard.

Q. I mean the Shepard Steamship Company.

A. Well, or any of the officials?

Q. I mean the company, when anybody from the company fired a man.

A. Well, I doubt if I could give you any specific instances offhand.

Q. Other than the one you mentioned?

A. Other than the one, because the one I mentioned is bright in my memory because of a specific instance that happened on the waterfront at that time.

Mr. Wood: That is all.

Mr. Peterson: That is all.

(Witness excused.)

EARL SANDERS, a witness produced in behalf of the defendant, thereupon resumed the stand and was further examined and testified as follows:

Dire examination (Continued).

By Mr. Wood:

Q. Mr. Sanders, I think we were talking about the very [fol. 177] ices performed by a general agent beginning with the time a new ship was constructed, and you had explained

port with them to be done, but they would be the obligation of whichever department they were in to carry them on while the vessel is at sea.

Q. Yes, but I am trying to get at the definition. Here you have your vessel out at sea and certain repairs have to be made before the vessel can proceed. Now are those repairs you refer to as voyage repairs?

A. No, we wouldn't—we customarily never refer to those as voyage repairs. Voyage repairs, as we know it, are the repairs that become necessary when the vessel gets into port and completes her voyage.

. . . . .

By Mr. Hicks:

Q. Now these surveyors that you mentioned who are stationed in the local port and who are employed by the War Shipping Administration; what is the fact as to whether or not they exercise a sort of supervisory function in respect to repairs? They check to see whether they are necessary?

A. They check the vessel, the repairs to be made, the machinery, or whatever it may be, to determine whether it [fol. 161] is required, and then while in the repair yard they are on the job to supervise it and see that it is repaired according to their specifications.

Q. And the executives or officials of the general agent are there likewise cooperating and assisting, are they not, in respect to the repairs?

A. Well, I don't know what they would be doing except that they would be keeping in contact with the repair yard to see that the repairs are finished; but the job would be under the supervision of the surveyors of the M & R.

Q. Now, what is the fact as to whether or not the stevedoring companies, to your knowledge, have contracts with the general agents in respect to the loading, and that sort of thing?

A. Well, many of them did before the war, but after the war started and the War Shipping took over, why, their contract expired because there wasn't anything for them—the agents themselves had no cargo to offer.

Q. So then the general agents did not contract as agents for the War Shipping Administration in respect to the stevedoring?

the procurement of the master and the officers, and I think we had identified those letters from the War Shipping Administration with regard to the allocation of the vessel, and you testified concerning the taking of an inventory. Now, what else do you have to do in connection with getting the vessel ready for its voyage? You have already testified you had nothing to do with the cargo, as I recall it. I am not sure if I asked you that question. Did you have anything at all to do with procuring a cargo for the vessel?

A. No, no.

Q. Or with loading the vessel?

A. No, not as a general agent.

Q. Now, how about storing a vessel. Will you explain your functions with regard to storing a vessel?

A. Well, while all the rest of this is going on we try to find out when they are going to get delivery, where you can find a place to store the vessel, and quite often that has to be determined with the aid of the War Shipping Administration because of priorities, bearing in mind that this entire effort was done due to the urgency of the war rather than with any other motive in mind.

The Court: It was a question of coordinating the thing, wasn't it?

A. That is correct.

The Court: In other words, during the war time our harbor down here was full of ships. Well, they had to have the War Shipping Administration to allocate different dock facilities for different ships so that there wouldn't be any collision between them; isn't that right?

A. There were many what we might call priority arrangements made during the war, some of them by direct presidential order, or a certain committee some place in some instances that reported to no one but the President of the United States. And then they would be in existence for a while, and then they would change to some other program. And what was in vogue at that particular moment of the "George Davidson" would be a little hard to describe. But in any event, during all this time it is up to us to supplement the limited stores that the Maritime Commission Procurement Division has supplied to the vessel through the medium of fitting stores, as it is called at Oregon Ship.



A. No, I don't know of a general agent that has a contract with a stevedoring company. It would be with the War Shipping Administration or with the Army or the Navy.

Q. Did I understand you to testify, Mr. Settle, that the general agent could make repairs himself up to five hundred dollars?

A. No, not himself, but he can go to that expense and have it done up to that point.

Q. I see. But if the amount went above five hundred dollars then the authorization would be required from the War Shipping Administration?

A. Yes, sir. That is the limit of his authorization.

Q. And that would be true as to voyage repairs or any other kind of repairs?

A. Yes.

Mr. Hicks: That is all. Thank you.

[Vol. 162] Mr. Wood: No further direct. Thank you.

(Witness excused.)

JOHN N. SNEDDON was thereupon produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Peterson:

Q. Mr. Sneddon, where do you live?

A. I live at 4025 Southeast Hawthorne Boulevard.

Q. In Portland, Oregon?

A. Portland, Oregon.

Q. What is your occupation?

A. I am the business agent of the National Union of Marine Cooks and Stewards for the Port of Portland branch.

Q. Do you serve in any other capacity with the union?

A. Yes, I am one of the general council of the union, which is recognized as the executive board.

Q. That is the executive board of the Marine Cooks and Stewards Association that is referred to here?

A. Yes.

Q. Mr. Sneddon, how long have you held these offices?

A. Pardon me, sir.

Q. How long have you held these offices?

A. Oh, I have been on and off an officer of this Marine Cooks and Stewards Union since 1937.

Q. You say off and on. Do you know whether or not you were in this office on October 31st, 1941?

A. This position I am in at present?

[fol. 163] Q. Yes.

A. No, I wasn't in this office at that time.

Q. When were you in this office following October 31st, 1941?

A. Pardon me. Can I have the question again?

Q. My question is when were you in this office, the office that you have referred to that you now occupy? When did you assume those duties?

A. I assumed the duties I have at the present moment the first week of March, 1944.

Q. And prior to that time did you have any duties or any official capacity with the union?

A. I was the assistant secretary of this Marine Cooks and Stewards Union in 1937 and 1938. Assistant secretary at that time was the second highest office in the organization. And in 1939 and 1940 I was the first—the official title of the job was the first patrolman in San Francisco, which was No. 1 business agent; and from October, 1941, until Christmas Day, 1941, I was the agent in the Honolulu branch; that is, in the Hawaiian Islands. And in September, October and November I was the agent for this organization with the Seattle branch, and from there I went into the United States Army.

The Court: That is October and November of what year?

A. 1942, your Honor.

(An agreement between Marine Cooks and Stewards Association of the Pacific Coast and Steamship Companies in the Intercoastal and Offshore Trade and the Alaska Lines, dated October 31, 1941, was thereupon marked Plaintiff's Exhibit 10 for identification.)

Q. Mr. Sneddon, I hand you Plaintiff's Exhibit 10 for identification and ask you what that is.

A. This is the master agreement between the Marine Cooks and Stewards Association and the Pacific American Steamship Owners Association.

[fol. 164] Q. And the date that it bears is October 31st, 1941?

A. Yes, sir.

Q. This exhibit is a printed copy, is it not?

A. Yes. It is an exact duplicate of the original agreement that we have with the Pacific American Shipowners Association.

Mr. Peterson: We offer this in evidence.

Mr. Wood: May I ask the witness a couple of questions? I may not have any objection to this, but I just want to satisfy myself that it is an original. I see, Mr. Sneddon, just for example, that on page 35 there is printed a decision of the Board under date of Washington, D. C., March 12, 1943, a decision before the Maritime War Emergency Board. This publication, then, was obviously printed after 1943.

A. You mean the publication?

Mr. Wood: This booklet was printed, obviously, after 1943.

The Court: That is, this booklet was printed after the date in '43, because otherwise you couldn't have a decision printed in it that is dated in '43.

Mr. Wood: That is after you were in the Army, of course. Now, what I want to know is are you certain that this agreement which is printed in the forepart of this book does not incorporate various amendments and changes in the working agreement that were made after 1941?

A. This agreement here is the original master agreement, and any other amendments that were made after that were made through negotiations with the Pacific American Shipowners Association, and they invariably had to be decided upon by the War Labor Board. And the War Labor Board and the different governmental agencies who had the power to hand down the decisions as far as maritime was concerned, they were handed down by them and they were [fol. 165] added to this as they were developed. And the negotiations actually, after they had been carried through so far, as far as they could be carried with the Pacific American, had to go to the different boards for ratification, and so forth, the same as we are in the position today: we have all our ships tied up waiting on the board's decision. The

agreement has been reached by one of the organizations and the Pacific American Shipowners Association, but nevertheless we could not go until we had the ratification by a governmental board. Another decision will have to be added to this when it is made.

Mr. Wood: Your understanding is that this is an exact printing of the first agreement, with the exact printing of the amendments?

A. That is true.

Mr. Wood: Well, if that is the case—

The Court: Very well. It will be admitted.

(The copy of agreement above referred to, so offered, was thereupon received in evidence as Plaintiff's Exhibit 10.)

By Mr. Peterson:

Q. Now Mr. Sneddon, are these printed documents placed on board the vessels as they leave a port, or before they leave a port?

A. Yes, they are for distribution to the membership generally, but we do make sure that each delegate on board each vessel is supplied with one of these along with a great lot of other material to carry on the work properly.

Q. And this contract bears on its face that the Shepard Steamship Company is a member of the Pacific American Shipowners Association.

A. Yes, they are. They have been for a quite a long while.

Q. Now, I hand you Plaintiff's Exhibit No. 9 for identification, and ask you what that is.

[fol. 166] A. Well, this is a copy of the agreement and working rules in the same kind of form as this other one. This is a supplement to this. This is what has been put out with our agreement. There were certain things negotiated and added to or eliminated, and so forth, and then this becomes the master agreement, replacing that one; when this one is out of date then this one replaces that, and this is our master agreement with the Pacific American Shipowners Association.

Q. And it bears on its face dated October 1st, 1944, and the further wording "Revised June 1st, 1945." I will ask you if this document in the printed form that this exhibit constitutes was placed on board vessels in the same fashion that you have described as to Plaintiff's Exhibit No. 10?

A. Yes, it was.



Mr. Peterson: We offer this in evidence. \* \* \*

(The agreement above referred to, so offered, was thereupon received in evidence as Plaintiff's Exhibit-9.)

Mr. Hicks: Your Honor, the question is coming up—it was mentioned by Mr. Sanders that they have a contract with the Masters, Mates and Pilots, and that it is a contract which was drawn up on the East Coast and that they were not signatories to the West Coast Masters, Mates and Pilots agreement. We do not have available now a copy of that agreement, but I think it is agreed that we should complete the picture with respect to these various agreements. I wondered if Mr. Sanders might have a copy of the one that was applicable to the East Coast, the 1944 agreement.

Mr. Earl Sanders: 1944?

Mr. Hicks: And the one that proceeded it, 1943.

EARL SANDERS, a witness in behalf of the defendant herein, thereupon resumed the stand and was further examined and [fol. 167] testified as follows:

Questions by Mr. Hicks:

The Witness: In short, we had an agreement—let's get this right now, if we can—consummated on the East Coast. Due to our intercoastal operation they controlled officer personnel agreements there. When we started out here, after being more or less out of business on this coast entirely for a period of time, and handled it under a general agency, the question came up then as to how we were to handle this. They wrote an agreement—I think we had a copy which I myself questioned because of some typographical errors, apparently, or something—I haven't looked at it for years—at that time. And it was agreed to by the Masters, Mates and Pilots, and applies to the M.E.B.A. as well—both instances—by their organizations in the East. And as you know, there were many, many agreements with the Masters, Mates and Pilots and the M.E.B.A. on the East Coast, while on this coast it was pretty well standardized under the Pacific American Shipowners. So then that was the reason that these cases that you have introduced here as evidence in a couple of exhibits were, at the instance

of the War Shipping Administration, I think principally, taken before the National Labor Relations Board, and they handed down a decision directing the Pacific American, on the one hand, with the subscribed membership—and in connection with the relations with those two unions they were the first to hand it down, I believe—and also directed the group commonly known as the Atlantic Coast and Gulf Operators, who had no collective agreement between themselves, and each individual one—I think there was some ninety-odd agreements with the Masters, Mates and Pilots, if I remember correctly—and they were all directed to change their agreements in any place where they were at [fol. 168] odds, and they printed a form. This is the one that I used is the Pacific American, because it has exactly the same language, but it does not include the whole agreement. They were told to write agreements to incorporate those changes and make them standard as to any other parts of the agreement not covered. And that is not an agreement; that is a handed down decision by the National Labor Relations Board with a case number attached to it period. That is just exactly what it is.

Q. Handed down by the National War Labor Board?

A. That is right. And it applies to War Shipping Administration ships. We have, for instance, in our files a letter from—I forget what union it is now, but one of those two licensed agreements—where Mr. Shepard signs up with somebody else to continue to use these terms for a certain period after the six months expiration—I mean when these would automatically go out. But our agreement—in this case I can't recall, when this case was handed down. I think these are dated in '44, and I think that that case made them retroactive to a certain time. But that was an effort to standardize the agreements of the Masters, Mates and Pilots and the M. E. B. A.

Q. After the National War Labor Board handed down its directives out of which the agreement came that you are now talking about, isn't it true that the steamship operators or the general agents signed the agreements and entered into actual agreements pursuant to those National War Labor Board directives?

A. Only in the name of the War Shipping Administration on this coast, I believe, because I don't believe—I could be corrected on this, but it would be technically correct—it

doesn't make much difference, but I think to be technically correct they will obtain as long as the national emergency exists and until it is declared off. I believe there [fol. 169] is something in there on that. But it wasn't there when they were written, but as I understand it they will take an acknowledgment—however, I don't think there is any issue on that point between the organizations and the operators. I don't think there ever will be. It will just be a formality of acceptance. But the history of it is that these were to clear up the inconsistencies among the divers agreements in effect pertaining to the Masters, Mates and Pilots and the M. E. B. A., because the War Shipping Administration wanted the thing somewhere within reason. We had one, for instance, that—frankly, from my own personal standpoint, why it was ever signed I don't know; I wasn't there and had nothing to say about it—but it had certain terms in it that if we had tried to do that, if we had tried to hire men for War Shipping Administration ships, which under the urgency of the war they expected us to get those ships going, and if they had tried to apply our agreement entirely to it on this West Coast there wouldn't have been a man on them.

By Mr. Hicks:

Q. This directive that came down from the National War Labor Board, as you mentioned a moment ago, out of which your contract grew, was signed by the Pacific American Shipowners Association?

A. Yes, that is right.

Q. J. B. Bryan, I resident, acting on behalf of the following member companies in their capacity as general agents of War Shipping Administration?

A. Yes, in their general capacity. That is the only way they signed it.

Q. That is what you were referring to in your previous testimony?

A. This may sound terribly technical, but in actual fact this one that he signed you will find in a true copy our name, [fol. 170] because there is a case with a slightly different number to it that takes in us and also takes in part of the Grace Line. The Grace Line is only partly in this; that is their West Coast operation.

**MICRO**

TRADE

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MARK



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**48**



Q. But the terms of the two agreements you refer to are identical?

A. At the time when that case came down that is what the idea was, to make them all uniform.

Q. Now Mr. Sanders, prior to the date of this agreement you were operating under the terms of another agreement; that is, by that I mean you were conforming to the terms of another agreement that was in effect with respect to your Pacific Coast operations; am I correct in that, with the Masters, Mates, and Pilots?

A. The actual fact is that—you are catching a time now when we were out of operation here on this coast, and I wasn't there. But as I recall, when we jumped into this general agency, under the statement of policy which had been written prior to our general agency contract, then it becomes a part of the formula that we either were non-union or we had a union agreement. Very suddenly thereafter they took on the ships or they were allocated the ships, and, if I remember correctly, without proper authority we signed those ships on under those wages of the Pacific American in the absence of any other specific information, which we evidently got soon after that, and that is this agreement here that you have here. If this is correct—it might be challenged, because I think the girl that typed it—I remember reading it four years ago—about drove me crazy with it.

Q. Now, from 1941 on, while you were operating coastwise on the Pacific Coast—

A. We didn't operate here in '41.

Q. Oh, you didn't at all in '41?

A. No. From about the end of 1940, to my knowledge, we didn't have an intercoastal ship out here. We had lost one [fol. 171] ship, and the Maritime Commission had taken two ships and chartered them out to some outfit from the East Coast. We didn't operate, and I wasn't even with the company. They did carry on, but they shifted the few ships they had left—all charters had to be through the Maritime Commission. Even though they were your own ships you couldn't do a thing with a ship. They would tell you what to do with them.

Q. But during '42 and '43 your company was operating ships coastwise on the Atlantic Coast as general agents; is that correct?

A. We took our first ship under allocation in Baltimore in August of '42.

Mr. Hicks: I want to interrupt, if I may. I don't want to keep Mr. Sneddon. He has to get back. I may have another question or two. I appreciate your courtesy.

(Witness withdrawn.)

JOHN N. SNEDDON, a witness produced in behalf of the plaintiff, thereupon resumed the stand and was further examined and testified as follows:

Direct examination (Continued).

By Mr. Peterson:

Q. Mr. Sneddon, did you serve on any port committees?

A. Oh, yes.

Q. On what port committees did you serve?

A. As I said, on port committees in San Francisco, in the years I previously mentioned, '37, '38, and so forth, and I also served on the port committee here in Portland.

Q. Now in your present capacity in the union have you received certain copies of the minutes of port committee meetings which you have attended?

A. I receive copies of all port committee minutes. I get [fol. 172] them all. They are all sent throughout the whole organization.

Q. You received copies of the minutes of port committee meetings?

A. Yes, I do.

Q. I hand you a document which purports to be a release dated January 7, 1945, from Hugh Bryson, Vice President, and I will ask you what that is.

A. This is a copy of the proceedings of our port committee meeting in San Francisco. There were a good many cases, about six cases, that were before the port committee, and this is the ruling as decided by the committee comprising the Pacific American Shipowners Association and the Marine Cooks and Stewards. This is a copy that is sent out to all branches for their guidance in settling disputes that come up in the meantime in other ports. So they have a ruling on these, and if any dispute comes up on board a vessel they have got one similar to this for checking. We have a ruling laid down so there won't need to be any

further port committee meeting on this issue and this ruling, which governs this organization.

Mr. Peterson:

Q. I will hand you a group of documents here and I will ask you if these are the documents that you selected pursuant to our request when we explained the general problem to you. What is your answer to that?

A. Yes, these are the things out of my official files. All of them are out of the official files and the official records of our union, every one of them.

Q. And the documents that you have here have been received in the regular course of business?

A. Oh, yes.

Q. Is it the regular course of business to receive copies such as appear in the documents that you have?

A. Oh, yes. That is the only way we can operate.

[fol. 173] The Court: He says they are part of the original records of his union.

By Mr. Peterson:

Q. Are you the custodian of those records?

A. Yes, sir. I am solely responsible for them.

Mr. Peterson: We will hand them all to you, Mr. Wood. We have prepared copies.

Mr. Wood: Are you going to offer these?

Mr. Peterson: We offer all of those in evidence, with the stipulation that copies may be substituted.

Q. Mr. Sneddon, during your experience in the capacity that you have described, have you ever known of a general agent discharging a seaman?

A. Oh, yes; many times.

Q. Have you ever known of a War Shipping Administration official discharging any seaman or master or licensed officer on board a vessel?

A. I could not talk officially for any of the licensed groups, but since I have been in this port I don't ever recall any official or anyone in an official capacity in the War Shipping

Administration firing a man in the department I represented; at least that. I don't know if it ever happened.

Q. Now, have you ever known of a general agent discharging a seaman in the presence of a War Shipping Administration official? If you want your letter to refresh your memory——

The Court: The War Shipping Administration's representative, John Settle, said that just was not done.

Mr. Peterson: We want to prove he was right.

A. (Referring to documents) Yes, I remember this case very well.

Q. What was the incident where a War Shipping Administration official was present at a time when a general agent discharged a seaman on board a vessel that was operated by the general agent?

[fol. 174] A. Pardon me?

Q. What was the incident that you recall when a War Shipping Administration official was present when a general agent discharged a seaman on board a vessel that was operated by the general agent?

A. The reasons for the firings and so forth?

Q. What were the facts as to the incident?

A. Well, the "Gonzaga Victory" come in here from the Orient and——

Mr. Wood: To shorten the matter, may I ask who was the general agent for the "Gonzaga Victory"?

A. Lidell & Clarke was the agent here for the Alaska Steamship Company.

Mr. Wood: I am going to object to any testimony about a specific instance of the firing of anybody.

The Court: You do know of a general agent firing one of the crew in the presence of a representative of the War Shipping Administration?

A. Oh, yes. I was right there. It was in the galley of the "Gonzaga Victory."

Mr. Peterson: Does counsel object to the other documents that we have proposed to introduce in evidence here?

Mr. Wood: Well, I will let you put one of them in by way of example and eliminate the rest.



The Court: The one he handed you there will be put in by way of example without objection, and the objection will be sustained to the remainder of them. You can have them marked for identification and file them.

Mr. Peterson: May we substitute a copy for that document?

The Court: Very well.

Mr. Peterson: I have a copy, if you want to compare it.

The Court: That is admitted without objection as an example proceeding. The objection to the remainder of [fol. 175] the documents of similar character submitted to counsel will be sustained.

(The copy of the document referred to, consisting of three pages, headed "Minutes of Port Committee Meeting," etc., dated February 2, 1945, so offered, was thereupon received in evidence as Plaintiff's Exhibit 11.)

Mr. Peterson: You may take the witness.

Mr. Hicks: We will withdraw our offer of the remainder, your Honor.

The Court: Very well.

Cross-examination.

By Mr. Wood:

Q. Mr. Sneddon, this exhibit that has just been offered, I notice, refers to Mr. Brown. I suppose that is Mr. Brown in Seattle. Do you know him?

A. I can't answer that question unless I can see—

Q. Mr. W. L. C. Brown.

A. Mr. Brown is the Brown of the Pacific American Ship-owners Association's port committee. He is a representative of the port committee in San Francisco.

Q. Do you know what his initials are? Is that W. L. C. Brown?

A. Yes, I know it is W. L. Brown.

Q. You mentioned you knew of lots of occasions of discharging or firing. Can you name any occasion when the Shepard Steamship Company fired any member of the crew?

A. Oh, yes; a good many instances.

Q. The Shepard Steamship Company?

A. Yes.

Q. Well, name one.

A. In 1938—1939; pardon me—I was patrolman of the

Q. You already explained that an inventory was taken.

A. That was an inventory. Now to supplement that—

Q. Just briefly, you would go to the different supply houses for food and groceries?

A. We would purchase in the name of the United States Government all the stores, subsistence, and the rest of it, in their name.

Q. What type of articles would that be? Flour, sugar and meats?

A. All subsistence stores. That is everything to eat there.

Q. How about the ship's supplies, such as rope, paint—

A. Rope, paint, cement, buckets, toilet paper, whatever you happened to need. It is quite a job to figure out what you do need.

Q. How were bills for those things rendered?

A. They are rendered in accordance with the War Shipping Administration's instructions to us.

Q. And to whom are they rendered?

A. With the prescribed certification which the Comptroller General of the United States requires on all bills for the account of the United States, which is a vendor's certification as to its correctness. Having that on there, we then check those bills against the actual receipts that the vessel's officers sign over to us. We check the compilation [fol. 179] and send those approved as to computation to our Boston office, where disbursement is made from this revolving fund.

The Court: Made on your company's check?

A. They are made—no, I don't know,—no check that we had ever had before, because it is in a different bank than Shepard ever uses. It is set up in a separate bank, a separate account entirely.

The Court: But Shepard draws the check and signs it?

A. Shepard or any general agent is authorized by his general agency contract and subsequent fiscal regulations to sign those checks.

The Court: The point is this: The agency contract provides that the government shall reimburse the company for the expenses for maintenance, and such as that, and they can make advances, and all of that. That was in the President's directive too. But the actual direct dealings between the seller of the commodity used aboard the ship, the actual transaction was between the seller and the Ship-

ard Company as general agents. Then the money Shepard uses to pay for the thing may come from the War Shipping Administration, or through it.

A. I might correct, if I may, one impression. By the time we got into this general agency, the idea of reimbursement was entirely out the window, because it had practically broken some of the biggest steamship companies. Reimbursement was so slow that the actual money was provided for—I guess this is subsequent to GAA 4-4-42; I am not sure—it provides for the United States Government to make available to the general agent a fund of money which is to be set up in a thing called a revolving fund, which he is to disburse from, and he is not to use it or put anything in it except that which he is willing to swear is to the account of the vessel. We also certify in passing a bill through that we have accepted no rebates, nor anything of [fol. 180] that nature in connection with this sale, nor any commissions for having bought it, or anything to that extent. It is strictly a deal—and the vendor's certification makes it so that he is taking an oath to the United States Government that he is making a deal directly with them, and that it is true. He can collect on that bill over our objection.

By Mr. Wood:

Q. Mr. Sanders, how do you require that the bills be rendered to Shepard as agents? How is that bill addressed? Is it made out just Shepard Steamship Company?

A. No, United States of America, War Shipping Administration, Shepard Steamship Company, General Agents.

Q. Now, supposing purchases are made in the State of California or Washington, and a sales tax is in effect. What is the practice as to whether or not a general agent pays the sales tax on those purchases?

A. If the general agent bought anything as an individual he would pay the sales tax. The government requires the vendor to charge a sales tax. But the general agent is not buying this. The government is buying this, and the general agent, according to his agreement, upon signing it is issued a tax exemption number by the United States Government, which he can use in the event he is charged a sales tax, which he should not be. However, this vendor's certification on these states—they have a clause that no state or local taxes have been charged.

Q. In other words, if the general agent purchased something—

A. I mean for his own account, he is no different than anyone else, like if you purchased it.

Q. Like an office desk, or something like that; but things purchased for the vessels—

A. Things purchased for the United States vessel, for [fol. 181] the account of the United States—

Q.—are tax free?

A.—are tax free.

The Witness: I might say one thing in that respect: This GAA contract specifies certain things, but it has been supplemented by fiscal regulations and auditing and accounting instructions, and our instructions specifically, very specifically, from the outset, before the first ship we ever took over, were absolutely to buy nothing for the account of the Shepard Steamship Company. We have that in my files.

Mr. Hicks: If we are going to have a quotation from any regulations, I think we should see them.

A. I don't know. I couldn't quote it.

The Court: Under this contract and under the President's directive, why, the War Shipping Administration had the power to make advances and everything else.

By Mr. Wood:

Q. Now Mr. Sanders, we have the ship's stores and inventory, and so on. Now tell us about the procurement of the crew. I will call your attention to Article 3A (d) of the General Agency Agreement, which says: "The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon



[fol. 182] the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master." Now will you explain in practice—and do so briefly, because it is getting late—how you functioned under that to procure the mates and the crew on the vessel?

A. Check with the master to see if he wants to get the crew down there the first thing in the morning of the day we get delivery, just how he is going to work it out as to relieving the delivering crew from the shipyard. We call the three unions, unlicensed, and tell them such and such a ship loading out, such and such a dock. Have a full crew." That is in case of new ships coming in.

Q. Do you have anything further than that to do, in picking candidates?

A. Never see them in most cases until they arrive.

Q. Where do they go?

A. They go to the ship. They report to the ship.

Q. Who do they report to on the ship?

A. Well, the deck crew reports to the mate, as a usual thing. The engine crew reports to the first assistant, and the steward's crew to the steward.

Q. What I want to find out is whether anybody from the Shepard Steamship Company's office, anybody from Shepard's shore personnel, goes down to the ship to interview those men or otherwise to pass on their qualifications?

A. No.

Q. Will you explain now how the crew signs the articles? Who signs them on?

A. They are signed on in front of the Shipping Commissioner.

Q. If a man is unfit for duty, who decides that? Who [fol. 183] makes the decision and sends him back and asks for another man?

A. Assuming that a man has proper qualifications issued by the Steamboat Inspectors, it is pretty hard for anybody else to question his ability, until he is either drunk or something.

Q. Well, suppose a man came down too drunk to go to work?

A. That is the master's responsibility to keep the crew straight.

Q. I mean who would tell the union that they didn't want

the man? Would you do it, or would the master do it? I mean I am just trying to figure out whether the ship's officers—

A. They quite often would just send him back to the hall there and call for matters of reciprocal—in the business of handling this thing we all insist that they be ordered through the office now, because there would be duplications going down there, two or three men called, so everything is cleared through our office. We order another man for the job.

Q. Who would send him away from the ship?

A. Well, probably the chief engineer, if it was down below, or the captain if he is aboard, or whoever happens to be in charge of the vessel at the time.

Q. If you yourself were aboard one of the vessels at that time would you exercise that prerogative to send the man away?

A. No.

The Court: If you were down on that boat and the crew had been sent down, and you saw one of the crew that was just all crippled up where he could hardly walk, you mean you would not have a right to send him back and say "Send us an able bodied man"?

A. Whether I would have a right to?

The Court: Yes.

A. Under this agreement that we are under here with the War Shipping Administration I would not have a right to. [fol. 184] The Court: Why not?

A. Because they are subject only to orders of the master. Besides which it is a very poor policy for any steamship man—

The Court: To override the master?

A. —to override the master. That is what you have got him there for. You can't keep good men—

The Court: In other words, you pick the master. Well, suppose that the master you selected and sent down there had got by with the approval, and you found out when you got down there something that absolutely disqualified him?

A. The master?

The Court: Yes—that absolutely disqualified him, that had not developed when you submitted him to the War Shipping Administration, and he had even gotten by them, but you discovered before the boat sailed that he was absolutely unreliable and incompetent, and that after a few days at

sea he went crazy, and it was dangerous to send him out, and you discovered that. Wouldn't you have a right to order him off?

A. No.

The Court: And send down another master for approval? Or would you just let him go?

A. No. The United States Government many years ago provided for that. The master is qualified under his license issued by the Steamboat Inspectors Service, which was in the Department of Commerce for many years, and latterly in charge of the Coast Guard. And no one can—any master, that I might attempt to fire would have a right to appeal, and it has been done in many cases—a master has collected a great deal of wages due to wrongful discharge, because there is nobody that can tell him that he is unqualified except the Steamboat Inspection Service that issued the license.

[fol. 185] The Court: That is not the question that I asked you. I assume that if a discharge was wrongful and without cause, or even if the master felt it was wrongful or without cause, he would have recourse. But I am taking just a rare and extreme case, perhaps: Supposing you certified a master to a boat, he had all his papers in order and everything; that is, he has papers showing that he is the master, and you certified him down there, and he gets by the War Shipping Administration on the papers that he exhibits, but before the boat sails you discover that all his papers are forgeries; that he is not a qualified or approved master or anything else, and he has no right to ship as a master. Wouldn't you have the right to kick him off that boat and send for another master?

A. That is a matter for the Coast Guard. They have a hearing unit, and have had for many years for that purpose. They wrote his license—

The Court: You are begging the question. I am asking if the Shepard Steamship Company, who send him down to that boat as master wouldn't have a right to take him off of that boat when they found that his papers were fraudulent; that he was not a competent, qualified master, and he had no business in charge of a boat? Do you mean to say the steamship company wouldn't have a right to fire him and send another master on board the boat?

A. We wouldn't be able to find out if his papers were fraudulent until he had had a hearing, because he has a

right to that hearing before the Coast Guard. A master is not just a common laborer—

The Court: What?

A. A master is not a common laborer, by any means. He is authorized and has his license—

Mr. Wood: Maybe we can get it by just asking the witness what he would do if he found that situation. What would you do if you found that situation?

[fol. 186] A. If I found that situation, and I suspected it to be true, I would notify the War Shipping Administration. We have done it, as a matter of fact, right here. We have notified the War Shipping Administration that we had a situation like that on our hands. It happened at the time that we had a Shipping Commissioner present. We contacted the Coast Guard. The Coast Guard called the man up to their hearing unit, and he became a little obstreperous up there, so they got a little tough with him. That was out of our hands. They took his license away from him. Consequently he wasn't qualified as a master, and he was dismissed himself.

The Court: Then there is no difference in that situation during the war and what it was before the war. That always has been the practice.

A. Well, of course, before the war we had him directly under our control. I mean it was a matter of mechanics. There were lots of men with master's licenses, and if he got too tough they just didn't get a ship next time, and they knew that.

By Mr. Wood:

Q. Before the war could you have fired them directly yourself, or would you have fired them directly yourself?

A. I would not in my position, no, because before the war in that particular case that work was handled and the jurisdiction over them was handled strictly in the head office in New York.

Q. Well, I mean in the head office. Could Mr. Shepard fire them directly?

A. On our own ships?

A. Yes, on your own ships?

A. Yes, they could have fired him as a matter of general principle, that they just didn't want him handling their affairs. He is handling their money and their affairs period.



[fol. 187]. Q. I mean could they fire him without having a hearing before the Coast Guard?

A. If they were sure they were right. He might still have recourse against them.

Q. He could sue for wrongful discharge?

A. Yes.

The Court: There is no difference during the war as to that situation.

A. The difference during the war was that he had recourse right away, because he knows what his rights are here, and he knows that we are not his employers and he can go right to the War Shipping Administration, which they did immediately, and seek to recover. That is entirely the difference.

The Court: All right.

By Mr. Wood:

Q. Now, I suppose you had other duties. You would order docks would you, for moving a ship about in the harbor, if they had to move to several docks during loading?

A. Well, up until the time it is turned over either to the Army or the Navy or the berth agent we would take care of the piloting and whatever necessary moves are made, and then we turned it over to them and they took over from then on.

Q. After it is turned over to the Army, Navy, or one of the berth agents, they would order docks; is that right?

A. They usually take care of it. Yes, that is right.

Q. Now about the ordering of pilots for the vessel?

A. Well, that varies in various ports. I mean it is a matter of just cooperation between the berth agent and the general agent. In the usual case the berth agent knows what moves he wants to make and when he wants to make them to work in with his cargo, so he handles it.

Q. Now, I want to hand you Defendant's Exhibit I for [fol. 188] identification, and have you identify that document and tell what it is. It is, I should say; it is not a document.

A. This is a letter from the American President Lines, May 27, 1943, to us.

Q. Was it received in the Portland office in the regular course of business?

A. Yes. It has a received stamp there.

Q. The American President Lines was the same company that had been appointed berth agent?

A. Correct. Pursuant to those instructions they asked us to—

Mr. Wood: I show this to counsel and then I will offer it in evidence.

The Court: Any objection, Mr. Hicks?

Mr. Hicks: No objection.

The Court: Admitted without objection.

(The letter referred to, dated May 27, 1943, so offered, was thereupon received in evidence as Defendant's Exhibit I.)

The Court: Was the American Steamship Company berth agent?

Mr. Wood: American President Lines was berth agent for this vessel.

Q. While on that subject, do you know of your own knowledge where the American President Lines operated in peace time?

A. Yes, it operated around the world service to some extent.

Q. The far Pacific?

A. The far Pacific, yes. American President Lines is a government owned corporation.

Q. They operated generally on the route on which the "George Davidson" made this trip; is that correct?

A. That is correct.

Q. Now I will hand you Defendant's Exhibit J for identification.

A. This is the prescribed authority for the berth agent to sign bills of lading for the master, signed by the master, [fol. 189] at the request, in that other letter.

Q. That, I notice, is a copy. Is it from your official files?

A. Yes. I took it out of the files this morning.

Q. Would you be able to say whether it is a true copy of the original signed by the master?

A. I am quite sure it is, because it is a prescribed paragraph here.

Q. That is addressed to the American President Lines, so you would not have the original, would you?

A. No. They have, I think. He signs about six of them, whatever they ask for.

Mr. Wood: We will show this to counsel and offer it in evidence. It is merely the master's authorization to American President Lines to sign bills of lading.

Mr. Hicks: No objection.

The Court: It will be admitted.

(The carbon copy of letter dated June 2, 1943 above referred to, so offered, was thereupon received in evidence as Defendant's Exhibit J.)

By Mr. Wood:

Q. Now, is that about all there is to getting the ship on her way? Does that about complete your duties?

A. Outside of getting the master and the custom broker together, where he can clear the vessel, and getting the copies of his crew list to the various interested parties in the military, to change from time to time, which is all secret and had to be given to the proper authorities.

Q. Then who gives the master his sailing instructions?

A. His sailing instructions, if he is working for the Army, or the Army has been allocated the ship—

Q. When you say "working for the Army"—

A. I mean if the ship is working for the Army, or at least been allocated to the Army.

Q. That might be a ship for which you were general agent?

A. Oh, yes; rather than being allocated to another general [fol. 190] agent for a Lend Lease cargo. That is one place they used them. If they went to the Army, the Army gave him his instructions.

Q. And some would be allocated to the Navy, would they, or assigned to the Navy?

A. Yes. That was sailing orders. And if it was a berth agent that was handling them, why, usually they sent them to the Navy, and the Port Director had it all, because they are governed entirely according to the security regulations. No one but a military, Army or Navy authority issued any instructions or was supposed to have any knowledge of the route or destination.

Q. Did the Shepard Steamship Company give the masters any instructions?

A. No.

Q. As to where to go with the ship?

A. No.



The Court: It was all a matter of secrecy, wasn't it, so as to protect the ship from hostile craft?

A. That is right.

The Court: If there were any lend lease, or if they were carrying supplies or something to the Army, of course, the fewer people that knew where that ship was going the better chances the ship had of getting to its destination safely. And I suppose oftentimes the master never knew anything about just exactly where he was going until he was at sea.

A. His routing, I believe—not being a master and never having been to a route conference, I believe it was entirely secret, and to be opened at sea only.

The Court: In other words, he would be instructed to get out to sea and then open his instructions?

A. Yes.

By Mr. Wood:

Q. Then did you ever given the master instructions on [fol. 191] how to navigate the ship or how to manage or operate his ship after he got to sea? Did you ever give the master instructions on whether he should sail at eight knots or ten knots, or things of that nature?

A. During the war, of course, it was all a matter of Navy routing; distances, positions, and space and routes.

Q. Now, how about ordering fuel for the vessel? Did the general agent have anything to do with fueling her for her voyage?

A. Yes. That was one of our duties, to see that she was provided—those instructions came from the District Marine Superintendent at San Francisco.

Q. What was his name?

A. George Eggers.

Q. Whom does he work for?

A. The War Shipping Administration.

The Court: Before the war when you selected a master to take a ship at sea, you didn't pretend to tell him how to navigate the boat, did you?

A. The port captain and port engineer were charged with the responsibility then of our equipment, and also the individual there that was most interested—the owner of the vessel—Mr. Shepard himself writes him some very, very



strict letters about the balance of economy between excessive speed and wearing out a ship; very much so.

Q. It was quite frequent, wasn't it, in peace time for steamship companies to issue rather complete instructions to masters covering various phases of navigation, such things as telling him not to sail too close to lee shores, hidden reefs, and things of that sort?

A. Well, that was supposed to go more or less without saying, but I mean the matter of economical operation as between the balance of speed and fuel consumption, and that kind of thing, they most certainly told them.

[fol. 192] Mr. Wood: For the Court's information, I will say that I helped write a rather complete set of instructions for masters in peace time.

Mr. Hicks: That makes Erskine an expert, I guess.

By Mr. Wood: —

Q. Then after the ship leaves port what are you busy with?

A. Well, mostly making out—clearing out these bills and getting them back, these invoices, so they can be—we pay all ours; it is all paid from this account in Boston. They ultimately have to be cleared through there.

Q. Just to put it briefly, you have got a large amount of accounting work to do after the vessel has left?

A. Yes, get all these accounts in shape for the auditors, the government auditors, and many operating reports and statistics, and so on, that the War Ship requires in their division of research work.

Q. Now, what would you have to do with a vessel such as the "George Davidson" when she touched at a port out in Australia or New Zealand or Tasmania? What if anything would you have to do with the handling of that vessel in one of those ports?

A. You mean at the time of this voyage?

Q. Let's take the "George Davidson."

A. We had no representation out there whatsoever.

Q. Who would take care of it out there in those ports?

A. In this case the berth agent, I believe, had a list of agents that in some places might be foreign and in other places might not be foreign. In all cases there was a WSA representative there—most always.

Q. In the foreign areas, in military zones?

A. Yes.

The Court: That is on the matter of cargo?

A. What?

The Court: That has to do entirely with the matter of [fol. 193] cargo, doesn't it?

Mr. Wood: Is that limited entirely to cargo?

A. No. That carries—that is an extension of our duties which we are unable to perform in foreign areas.

Mr. Wood: Such things as refueling the ship for further voyage, or replacing members of the crew who have been sick or injured, or obtaining spare parts for some broken down engine, or emergency repairs made in a foreign port.

The Court: Who does that? The berth agent or the master of the ship?

A. Who does it?

The Court: When you get over to Tasmania, for example, supposing the ship's stores are low and they need some more food for the men?

A. That is up to the master to find it.

The Court: The master will find it. If there are any repairs necessary on that ship, the master will arrange for that, won't he?

A. Well, the usual procedure would be, I believe, he would seek out a War Shipping Administration official, if there is one, or the military commandant of the area, because he is under military orders when he is out there in the war zone.

By Mr. Wood:

Q. Do you know whether the War Shipping Administration representatives in those ports or the Army and Navy men when they are in strict military zones would handle those things for the master?

A. Yes.

Q. You know that, don't you? I mean you know that from experience on your own vessels?

A. Yes.

The Court: When a ship in peace time was at sea and gets into some foreign port and runs short of supplies, your [fol. 194] office here isn't there to tell them what to do and how to do it.

Mr. Wood: This company didn't run to any foreign ports in peace time. They were an intercoastal company.

The Court: I know, but if they were running in a foreign port.

A. It would be a rare setup if they didn't supply the master with a complete list of foreign agents to use in any place that he might turn in.

The Court: But they looked to the master to get that ship to its destination and back home again, didn't they?

A. Of course. He is always in charge in any case. He is in command of the vessel.

The Court: He was before the war, he was during the war, and likely will continue to be?

A. We hope so. We rather doubt it.

By Mr. Wood:

Q. Now, say the vessel makes her voyage and finally returns to a port in the United States. I think Mr. Settle covered the matter of repairs, and I won't go into that. How about your duties with respect to paying off the crew? What is done with respect to paying off the crew when the vessel finally returns to a United States port?

A. Well, our port auditors go down and get the purser and assist him and the captain in working up the payroll. They work that up first and try to audit overtime against these agreements and all and eventually get the payroll, and it usually takes about two days.

Q. Where does the money come from to pay off the crew?

A. The money comes from this special account, in our case from the Boston City National Bank.

Q. To whom was it sent?

A. Sent to the account of the master, in his name, as John Jones or whatever his name may be.

[fol. 195] The Court: Your company sometimes draws money out of that fund and gives it to the master or to the steward or somebody when they start on a trip, don't they, so he has some money aboard?

A. There are security regulations which provided, as we understand it and interpret it, and still interpret it, on War Shipping Administration vessels that no government money goes out with the ship.

The Court: Whose money does go out with the ship?

A. Nobody's.

The Court: Your own?

A. None.

The Court: How do they give these sailors a little advance? Now this man's bill, for example—he drew quite a bit of cash that was charged to him before he was finally paid off. Where did that money come from?

A. The War Shipping Administration had arrangements with the Army, the War and Navy departments, for transfers of funds from the finance officers in every military area. The master got his funds in foreign areas from those sources.

The Court: I have some personal knowledge of the situation because one of my sons shipped on that boat and knew something about it personally, and I know that the sailors aboard the boat could draw money from time to time during the war period, while sailing on these merchant ships, Liberty ships. Now the master certainly was not using his own spare change to advance this money.

A. I will repeat, your Honor, that any time a master arrives, for instance, in Subic Bay; he has a crew there that he has to keep going. He can go to the finance office of the Army or Navy, or wherever the War Shipping representative was around him, and he can seek them out and he can [fol. 196] get all the funds he needs for advances from them. He signs for that money. Those receipts eventually go back through the accounts and are charged against his voyage account. Then when he gets through in that port he will return and get a receipt for what he returns to the Army or the Navy, and he will leave clean again.

The Court: When he leaves out of the Portland port, on this "Davidson" for example, does the general agent start that master out of this port without a dime?

A. Correct. I will correct myself: Not out of—yes, out of this port. In San Pedro he was again supplied with funds on arrival, sent to his own order. He himself must go to the bank and sign for it. It belongs to the War Shipping Administration.

The Court: Who put the money in there?

A. It is sent from this special account. We send a warrant—

The Court: I know, but the point is, and what I am trying to get at, it seems to me we are kind of quibbling about the



matter of finances. The War Shipping Administration put up all this money into a special account.

A. Correct.

The Court: The Shepard Company drew on this account; isn't that correct?

A. Yes.

The Court: The War Shipping Administration puts up this money that the Shepard Steamship Company carried in a special account. It is War Shipping Administration money.

A. We disburse the bills.

The Court: But you disburse it?

A. We disburse it; correct.

The Court: On your own check. That is a special check on a special fund.

[fol. 197] A. Yes.

The Court: So if the master gets any money out of that fund you give it to him out of that special fund; isn't that true?

A. The distinction is this: That anything that is paid to the crew—anything paid to the crew as payroll on that vessel is the master's disbursement. It is sent to the master's order, a check or wire usually, sent to the master at whatever bank we tell him he can go, and he goes to pick it up. It is not sent to any particular branch house. We only have one War Shipping account, which is in Boston.

The Court: But you send your check or you send your wire to the master?

A. No.

The Court: Drawn on this particular fund?

A. No. In the case of a wire our office—yes, our office writes a check and sends it down there to the bank, sends it to the order of the master.

The Court: To the master. That is what I understood.

By Mr. Wood:

Q. That is in United States ports?

A. Yes.

Q. What you were saying is the master, under the regulations, is not supposed to carry money aboard ship when it is navigated at sea; is that it?

A. That is the instructions we have.

Q. But he could get all the money he needed in any port that he needed it?

A. Yes.

The Court: Could he get money in a port anywhere he wanted to without your O.K. on it?

A. He could as long as there was a War Shipping Administration official there. We have had one occasion that I know of of a master coming into a port, a small port, in the Philippines—but this is since the war—where the War Shipping Administration port representative had vacated, and some second lieutenant or something in the Army doubted his authority to give the master funds. They sent us a cable, and we doubted the necessity of our authorization, because it was supposed to come from the War Shipping Administration. We finally got an O.K. from the War Shipping in San Francisco, and he sent the Army an authorization to pay that money.

• • • • •  
Cross-examination.

By Mr. Hicks:

Q. Mr. Sanders, who are the licensed deck officers on the ship, as we refer to them in these documents and agreements, and so forth?

A. The licensed deck officers?

Q. Yes.

A. The master, the mates, the chief engineer, the first, second and third. On a Liberty ship there are others farther down. That is it.

Q. We were discussing formerly in the record the situation of the Masters, Mates and Pilots organization with respect to the operations of your company on this coast, and you were good enough to produce from your files the document which I have in my hand and which was not marked for identification, the one under which you said you operated and abided by.

A. The way the War Labor Board—we are not signatory to this one, however, I might point out.

Q. No. But it is now in vogue?

A. Yes, it is a standard form now—no, not now either—because it has been amended; that is, just at a certain particular point. That is all changed now.

Q. Yes. I simply wanted to identify the document for the purpose of the record, it being the same one that we were discussing.

A. That is my only copy of that. I just use that as a matter of convenience.

Mr. Hicks: May it be agreed that the document which the witness testified to in regard to the Masters, Mates and Pilots, involving National War Labor Board case No. 111-1360-D, and which is dated May 6th, 1944—it was that document which your testimony related to when we were discussing the Masters, Mates and Pilots situation?

A. To be technically correct, the one we are interested in—I think it is the same as that, but, you know, as far as it goes that is just a case or decision—has got a different number on it. The Atlantic Coast group that we were on, it was a different numbered case. It was taken up separately from this, and as a separate case, I think. Maybe not.

Q. Yes, but my point is that you were operating under the terms of this agreement and acquiesced in and acceded to this agreement?

A. In fact, we had a directive from the War Shipping Administration some place in there that tells us when to use that. That is their agreement.

Mr. Hicks: Now may it be stipulated that a transcribed copy from the National War Labor Board reports, being the case number I have designated, may be received in the record?

The Court: Have you any objection, Mr. Wood?

Mr. Wood: No, I haven't. I am a little confused on this thing myself. Shepard is not a party to this one you have here.

Mr. Hicks: True, but the witness—

[fol. 200] The Court: The witness says they worked under that.

Mr. Hicks: They worked under that and abided by its terms, though they were not signatories to it.

The Witness: I say, I used that for reference.

Mr. Wood: All right; with that explanation of the testimony, I have no objection.

Mr. Hicks: Now, may it likewise be stipulated that inasmuch as this agreement which has just been identified as Case No. 111-1360-D of the National War Labor Board provides in subsection (a) on the second page thereof that "The

terms and conditions of employment of licensed deck officers as heretofore specified in Case No. 111-4649-D shall apply in their entirety,"—inasmuch as that clause is contained therein, to make the record complete I ask counsel to stipulate that that case of the National War Labor Board which I last mentioned and described may be inserted in this record, and that we be permitted to supply a copy of that contract and decision for the purpose of this record, and that it may be marked by the reporter as one of our succeeding exhibits.

Mr. Wood: I would just first like to ask the witness if he knows positively whether the agreement that Shepard had had that identical clause in it. You see, this is not a copy of Shepard's agreement. This is the one that he testified that he generally referred to. If he knows that the actual one applicable to the Shepard Steamship Company had this identical clause in it, then I would so stipulate.

Mr. Hicks: I will ask Mr. Sanders.

Mr. Wood: Show him that clause and see if he knows that that is in their contract.

By Mr. Hicks:

Q. I will ask you whether or not your company accepted and operated under the terms of the agreement which you hold in your hand.

[fol. 201] A. At what time are you referring to, what period of time?

Q. I am asking you the period of time under which you did operate under that agreement. You don't have to make it exact. Make it rough.

A. "The effective date of the"—I am quoting here from the effective dates—"The effective date of the foregoing provision"—certain sections have effective dates noted in here as a part of it, and various sections have different effective dates. It says at the bottom, "The effective date of the foregoing provision shall be"—this is the negotiated effective date—"The effective date of the foregoing provision shall be in accordance with the decision and supplemental decision of the National War Labor Board in case No. so and so."

Q. But you operated under it during the effective dates prescribed, didn't you, Mr. Sanders?



The Court: You produced the document. Let's get along. You either operated under it or you didn't. Let's not be technical.

A. We didn't operate under that document whatsoever.

By Mr. Hicks:

Q. Well, you operated under the terms of a document—

A. I don't know. I would have to see the one that has got our name on it before I could answer that question.

Q. You are not familiar with the terms without seeing the one that has your name on it?

A. I don't think there is a man in the world that can keep track of the various changes in all these documents for one year; let alone five years. It is a human impossibility.

Q. You do have a document that is signed by you, or by the Shepard Steamship Company, involving the Masters, Mates and Pilots and their relationships with yourselves as general agents and the unions as the contracting parties?

A. As I mentioned before, these unified standards, certain [fol. 202] standard agreements, were taken up in two groups by the National War Labor Board. That is a matter of history and a matter of record.

Q. I am not arguing with you about it.

A. I am telling you why I don't know, because I can't remember all of that, and I have used that copy simply as reference because—and I have no occasion to have any particular negotiations and arguments over the issues in it, so I don't know. But there is one, and it is a matter of record in the National War Labor Board or the War Shipping Administration, and it has been available ever since to the United States Government, who own and operate the ships. It is just a simple matter of record, and I can't testify that that reads exactly the same as the one that has our name on it, nor who and how it was signed, because it was entirely by direction of the National War Labor Board.

Mr. Hicks: May we stipulate that the two National War Labor Board cases which consists of contracts, and so forth, as shown by the official reports, may be received in the record in this case?

The Court: They will be received.

Mr. Wood: These two here?

Mr. Hicks: That is, Case No. 111-1360-D and Case No. 111-4649-D which I referred to.

Mr. Wood: When you put them in they will show whether Shepard is a party to them or not.

Mr. Hicks: Yes, and they will likewise show the relationship between the unions, on the one hand, and the general agents on the other, including this general agent.

The Court: Very well. They will be admitted.

Mr. Wood: I don't know what they will show.

The Court: You can furnish copies of those.

Mr. Hicks: Is there any objection to their being received? [fol. 203] Mr. Wood: I object to them on the ground that Shepard is not a party to them. If you are going to introduce them they ought to be the one that Shepard is a party to.

Mr. Hicks: Outside of that objection may they be received?

Mr. Wood: Outside of that I have no objection.

The Court: Very well.

(The two cases before the National War Labor Board above referred to, Case No. 111-1360-D and Case No. 111-4649-D, respectively, so offered, were thereupon received in evidence as Plaintiff's Exhibits 12 and 13, copies to be furnished by counsel for the plaintiff.)

The Court: Have you any agreement between Shepard and the Masters?

A. Yes, a standard—for War Shipping, as I have repeatedly said, for handling War Shipping Administration vessels, which is the only thing that we handled, we are in a similar case to this—it may be the same case number, but there are two of those documents there were written. I have seen them. I think we have one in our file in San Francisco.—I am not sure—a standard form of agreement applying to WSA vessels. That is all we handled and that is all we have. It is a matter of record in the National War Labor Board. That is what it is; that is the agreement we go by.

By Mr. Hicks:

Q. That is the agreement that you accepted and signed up and agreed to go by, too, the one you are talking about, after the War Labor Board had handed down its directive order; right?

A. How far that has gone I don't know. The effective date by the War Labor Board—what does it say there as to

when it shall be effective? It says in the back of that one. I think it is about the same thing.

[fol. 204] Q. Just a second. Did you want to identify some dates there?

A. The answer is here: "The effective date of the foregoing provisions"—that is at the end of the document—"shall be in accordance with the decision and supplemental decisions of the National War Labor Board in Case No."—now I would have to have all those supplemental decisions in order to tell you. That came out afterwards, so I wouldn't know.

Q. So far as you know, during the entire period that Shepard Steamship Company was operating as general agent there were no changes in respect to the relationships between the masters and the general agent and the unions? I mean in operating arrangements between them, their status. Do you follow my question?

A. You mean during this War Shipping Administration agency?

Q. Yes. The masters had the same status, we will say, to your knowledge in 1943 that they had in 1944 and 1945, the same duties, the same legal status, the same union status, and the same status with the company and with the War Shipping Administration that they had throughout. There was no change. That is my point.

A. Between our previous agreement?

Q. Yes.

A. One main change was that I believe that our previous agreements with the Masters, Mates and Pilots, the masters' wages were open to negotiations and not stipulated in the agreement.

Q. Yes.

A. And the War Shipping Administration agreements, as applied to War Shipping Administration vessels, had a specified wage, monthly wage, for the master in accordance with the size of the ship.

Q. And that wage was established through negotiations, to your knowledge, between the Masters, Mates and Pilots union, on the one hand, and the general agent operating companies on the other?

A. You mean the standard wage in there?

[fol. 205] Q. Yes, and I include the wage of the master.

A. No.

Q. You say that it was not a matter of negotiations?

A. No. To my knowledge, I can't see the logic of it if it was. The master operating under our previous one got, I believe, \$418.75, which was based on their previous—that is, of course, our agreement had no wage in there for a master, I don't think. We paid our masters, and the War Emergency, of course, added their percentage that was handed down by the War Emergency Board. That was not negotiated. That brought it to a figure of \$418.75, I believe. The first issue of standards that I recall put the wages of a master at \$415.00, and consequently any new master subsequent to that that we procured for War Shipping, the War Shipping Administration advised us we must pay not more than \$415.00 a month. So why we should negotiate anything less I don't know.

Q. Now, I am not talking about negotiating anything less, but you are not testifying, are you, that these wages that were paid the masters from time to time—you are not saying that those wages were not negotiated by the union, on the one hand, and the steamship operators on the other? You don't mean to suggest that, do you, Mr. Sanders?

A. You are talking about our other agreement, the first one?

Q. I am talking about the master's wages from '43 on through, '43, '44, '45 and '46, and I am suggesting to you that they were negotiated by the union and the general agents.

A. Our Masters, Mates and Pilots agreement in vogue in '43, the masters' wages were open only to negotiation between a master and the owner. If we didn't own any ships—well, we owned one, I think, at that time. [fol. 206] The Court: You mean the shipping companies like Shepard?

A. Our agreement that we had was an open question. It was in almost all Masters, Mates and Pilots agreements that I know of. Of course, I am not absolutely positive only from discussing this with many masters that I have known over a good many years. That is one question that the Masters, Mates and Pilots very seldom insisted on negotiating into an agreement. In the Masters, Mates and Pilots agreements the master is open to make his own deal, until they brought this standardized business in. I don't know what the Pacific American was prior to that time, but I think that in the Pacific American Shipowners Association agreement with the Masters, Mates and Pilots prior to this case



handed down you will find a dotted line opposite the master's wages. I am not sure of that, but I think—

Mr. Hicks: I think I have covered the questions from this witness, and I simply at this stage of the record, your Honor, want to direct your attention to Paragraph 3 of the National War Labor Board Case No. 111-1360-D, involving the Masters, Mates and Pilots, which we have been discussing here, which provides: "Nothing in this agreement shall prevent the general agent from discharging any licensed deck officer." And that includes the master, as the witness testified. That is all.

The Court. Well, that is in keeping with the testimony of Mr. Settle, of the War Shipping Administration.

Redirect examination.

By Mr. Wood:

Q. Who was it that set standardized wages for masters?

Mr. Hicks: If you know.

A. Who was it?

By Mr. Wood:

Q. Do you know how that was accomplished? You said [fol. 207] that previously it was a matter of negotiations and later the wages of the master were standardized. Do you know who standardized it? Who established those wages, or that wage scale for masters?

A. Your question assumes that it was standardized. I don't know.

Q. Did I understand you correctly to say that the War Shipping Administration—

A. I believe it was there in the National War Labor Board—these cases were thrown into arbitration. There were cases filed with the War Shipping Administration with all general agents everywhere. We went through the machinery of putting these cases before the National War Labor Board, and they handed down a decision. It was an arbitrated agreement that was arbitrated and handed down. I wasn't there—

Q. Do you know what part the War Shipping Administration took in it?

The Court: That is, do you know of your own personal knowledge?

Q. Do you know to what extent the War Shipping Administration participated in that?

Mr. Hicks: We object to that question unless the witness is prepared to say that he attended the conferences where the War Shipping Administration was present, attending and participating in them.

Mr. Peterson: In War Labor Board hearings.

Mr. Wood: I think he would know from official communications from the War Shipping Administration.

Mr. Hicks: If that is true, the official communications would be the best evidence.

Mr. Wood: Well, we are not getting very far.

The Court: No.

Mr. Wood: I think it is all in here, anyway, I will direct [fol. 208] the Court's attention at this time to the opening paragraph of this agreement.

The Court: Is that the one that Mr. Hicks offered in evidence?

Mr. Hicks: That is already in.

Mr. Wood: Precisely. It is one that he offered in evidence to which Shepard is not a party, and which reads: "The above designated dispute, -111-1360-D, involving licensed deck officers employed on any ships owned by or chartered under General Agency agreements to the War Shipping Administration on the Pacific Coast, and operating under collective agreements with the national organization of Masters, Mates and Pilots of America, Local No. 8, were certified to the Maritime War Emergency Board on February 3rd, 1943, and to the National War Labor Board on April 29, 1943. The National War Labor Board has been advised by the War Shipping Administration that it will accept the Board's disposition of this matter. Hearings have been held by the Board and its agent, the War Shipping Panel." Do you know what the War Shipping Panel was?

A. Not specifically, no.

Mr. Wood: I won't take time to read this. It is in evidence and you can refer to it. That is all.

(Witness excused.)

## COLLOQUY

Mr. Wood: There are two minor matters I overlooked in the rush Friday night. There are two minor bits of evidence that we wanted to put in on the issue of employment which in the rush to wind up Friday evening I neglected to put in.

The Court: What are they?

Mr. Wood: One was the printed P & I policy, which the government wrote with underwriters covering these vessels. [fol. 209] It is found in the War Shipping Administration's compilation of standard contract forms. The only purpose for which I wish to offer that is to show the limitations on the general agents in the settlement of claims.

Mr. Wood: The other thing I had, there has been received in evidence that statement of the wage account of Mr. Fink, and I wanted to have Captain Dopp—Mr. Sanders has gone, but Captain Dopp is equally familiar with that phase of payment to members of the crew—get on the stand and explain in this respect—it is very similar to the Hust case, too, if you read the record there—that the form used in that case was one of the forms left over from Shepard's private steamship operations, and they were still using them during the war, and they used it for Mr. Fink, and that it was a form that was printed when they were a private steamship company and it was in use then and carried over from that, and that subsequently they used this new form. And I have one of the forms here, Seaman's Wage Account statement, which they put into use afterwards. Concededly that is not the form that was used in the Fink case, but we simply wanted to offer that in explanation or in connection with the explanation of the form that was used in the employment of Mr. Fink.

Mr. Hicks: We will object to this on the ground it is neither competent nor relevant, and has no bearing on the issues here; it is a form that was used subsequently, and they changed these formal documents subsequent to the accident. I can't see how that would be pertinent here.

The Court: Well, I agree with you on that.

Mr. Wood: It is only in explanation of the form that you offered, to show that they didn't—

[fol. 210] Mr. Hicks: I understand your theory on that, but the best evidence of that would be—

The Court: I will sustain the objection to the admission of this evidence, but it can be marked for identification as a part of the record. You have no objection to its being offered at this time?

Mr. Hicks: Not at all.

(The form referred to, entitled "Seaman's Wage Account," was thereupon marked Defendant's Exhibit K for identification.)

Mr. Wood: As part of an offer of proof can I call Captain Dopp, or do you waive anything as to its identification?

Mr. Hicks: Yes, I waive that.

. . . . .

Mr. Wood: Now I want to offer this exhibit as showing the War Shipping Administration's limitations upon the general agent with respect to the settlement of such claims, because this Wartime P & I policy which was written between the War Shipping Administration and all of the insurance companies in this field had a clause providing for the settlement of claims by general agents and set specific limits as to general agents' authority for the settlement of such claims.

. . . . .

The Court: Very well. It will be admitted.

(The form of policy above referred to, so offered, was thereupon received in evidence as Defendant's Exhibit L, copy to be furnished by counsel for the defendant.)

. . . . .

[fol. 210½]

#### MOTION FOR NONSUIT

Mr. Wood: The defendant at this time moves for an involuntary nonsuit on two grounds: On the first ground that the evidence shows as a matter of law that the plaintiff was not an employee of defendant within the meaning of the terms as used in the Jones Act, and therefore plaintiff has no right to bring this action against the defendant Shepard Steamship Company, which is merely a general agent acting for the War Shipping Administration; on the ground that



War Shipping Administration was the real employer of plaintiff under the meaning of the Jones Act, and therefore the plaintiff should bring this action against the War Shipping Administration pursuant to the Suits in Admiralty Act and Public Law 17.

The second ground upon which defendant moves for a judgment of involuntary nonsuit is that on plaintiff's own case, established by the evidence of plaintiff's own witnesses, there has been no negligence proven, no substantial evidence of negligence to go to the jury.

#### DECISION ON MOTION FOR NONSUIT

The Court; It was the consensus of opinion of all parties including the Court, that the legal issue presented must be [fol. 211] decided largely in the light of the recent decision of the United States Supreme Court in the case of *Hust vs. Moore-McCormack Lines, Inc.* (No. 625, October Term of Supreme Court of the United States, 1945—decided June 10, 1946).

This Court has read and considered the original pleadings in the *Hust* case, the instructions of Judge Hawkins to the jury given on the original trial, the able and very exhaustive opinion of Mr. Justice Lusk in the Supreme Court of Oregon, the Petition to the United States Supreme Court for a Writ of Certiorari, together with all written briefs filed in the Supreme Court of the United States by counsel for the respective parties, as well as briefs filed by *Amicus Curiae*, and of course the majority, especially concurring, and dissenting opinions of the United States Supreme Court. This Court has also read and considered the Congressional Report having to do with the Clarification Act, which Act became effective March 24, 1943.

Regardless of what the conclusions of this Court might be were this a case of first impression before the Court, it seems to me that the question has now been finally determined by the Supreme Court of the United States in the *Hust* case, and that there isn't anything this Court can do but apply the principles laid down in that case to the issues here.

In the *Hust* case, the defendant was a "General Agent" operating under a General Agency Agreement entered into between defendant and the War Shipping Administration. And the same is true in this case.

Though it seems to this Court that this agreement is largely free from ambiguity, most courts have proceeded upon the theory that in some of its terms it is ambiguous, and hence have resorted to a consideration of some evidence aliunde.

[fol. 212] Under the Jones Act, it is universally agreed that a seaman in order to sue any given defendant must, as a condition to successfully maintaining such action, establish the relationship of employer and employee between himself and such defendant. And whether or not such relationship exists is to be determined by the common law tests (Mr. Justice Lusk in *Hust vs. Moore-McCormack Lines, Inc.*, 176 Oregon 669). The principal and controlling test at common law is whether the alleged employer has the right to control and direct the alleged employee in the performance of the details of the work. Other tests are also employed in determining the question. One of such tests is the right of the alleged employer to hire and to discharge the alleged employee.

Where there is a written contract between parties, the status of the parties must ordinarily be determined from the provisions of such contract. If the contract is ambiguous in any of its terms, resort may then be had to other evidence which may throw light upon the ambiguity.

Mr. Justice Douglas in his specially concurring opinion in the *Hust* case recognized this rule: "The question whether exclusive possession and management of the vessel have been transferred to the charterer turns on the facts of each case—a construction of the agreement between the parties, and the conduct of the parties under the arrangement," Stated Justice Douglas. But in arriving at his ultimate conclusion that the defendant in the *Hust* case was an "owner pro hac vice," Justice Douglas did so by construing the provisions of the General Agency Agreement, and not by a consideration of other evidence in the record.

In this, as in the *Hust* case, we must determine the status of defendant under the General Agency Agreement, in order [fol. 213] to ascertain whether defendant was the "employer" within the meaning of the Jones Act. The status of plaintiff as an "employee" is not determined by a consideration of the terms of this agreement between other parties. He is an "employee," but the primary question is: Who is his employer? Is it the defendant, or is it the War Shipping Administration? That must necessarily be deter-

mined by the contract between the defendant and the WSA.

In construing this General Agency Agreement, the Supreme Court of Oregon, as well as the United States Supreme Court, considered the same in the light of the overall national and international picture existing at the time it was entered into. We were in a war, and it was absolutely essential to our war-effort that all shipping be placed at the disposal of the government and operated as a unit. At the same time, it was just as essential that the world-wide facilities of private shipping interests be utilized to the fullest extent possible. And clearly, every law, every directive, every step taken was in the direction of permitting the established shipping interests to carry on as operators, surrendering only such portions of their ordinary peacetime rights, powers, and practices as were absolutely essential to military security.

The provision of the General Agency Agreement that the Master of the ship selected by the defendant and approved by the War Shipping Administration should be considered an agent and employee of the United States was a necessary requirement, when the nature of all war-time shipping is considered. All cargo carried was designated by the War Shipping Administration, and practically all of it was destined for military use. Necessarily, the destination of such cargo, the route to be followed by the vessel, the speed at which such vessel should travel, and a number of other [fol. 214] things in connection with operation of the ship, had to be subject to military control. To the extent necessary for security, the General Agent surrendered control, but only to that extent. In all other respects, the General Agent operated the vessel with all the incidents of such operations.

Ordinarily, the Master of a ship is in supreme command. At sea his word is law. But under war conditions, it was necessary that the Master be subject to military orders and directions. Hence, the propriety and necessity of designating him an agent and employee of the United States Government, and therefore subject to the orders and directions of the representatives of the government, particularly the Army and Navy.

But this designation of the Master did not necessarily mean that at the same time he was not also the agent of the defendant to carry out and perform the duties of the defendant in connection with the operation of the ship.

Under the Agency Agreement, as well as in fact, the defendant hired the Master ~~and all the crew~~, including the plaintiff. The War Shipping Administration had no rights in this respect, except that of approval or rejection of the men so hired. According to Mr. Settle of the War Shipping Administration, the defendant had the right and power of discharge, and even aside from this oral testimony, such right and power is implied from the nature and terms of the Agency Agreement itself.

It seems to this Court that the mere fact that the defendant surrendered to the United States Government in the interests of military security some of its peace-time rights of control as to the details of the work, in no way affected its status as the employer of the ship's crew. It was the actual operator of the vessel, the actual employer, to all intents and purposes an owner pro hac vice as suggested [fol. 215] by Mr. Justice Douglas in the *Hust* case.

Another significant bit of evidence offered on this trial before the Court is that having to do with the form filled out by a Master selected by the ship operator to take charge of the vessel. After being selected by the General Agent, the Master is required to fill out a form giving his name, age, residence, experience, etc., and this form is sent to the War Shipping Administration. If the WSA approves the selection, the Master takes charge of the ship. When selected to take charge of another ship, a transfer form is filled out by the Master and submitted to the WSA. If anything more than a mere technical employee of the United States, why the necessity of the General Agent again selecting the Master and having him submit a transfer form? Why shouldn't the WSA act directly by merely assigning or transferring him to another ship? The answer is that the Master is only technically an agent and employee of the United States, and in every instance where a ship is to be manned, the manning thereof is the primary responsibility of the General Agent.

The only essential difference between the situation in the instant case and that present in the *Hust* case is that the Clarification Act went into effect after the injuries complained of in the *Hust* case, whereas in this case it was in effect when the alleged injuries occurred. From this circumstances, it is argued that the *Hust* case is not decisive of the issue now before the Court.

Defendant contends that the decision in the *Hust* case



applies only to those cases arising prior to the enactment of the Clarification Act. Its argument is based largely upon the following statement found in the opinion of Mr. Justice Rutledge, speaking for the majority of the Court: "We need not determine in this case whether prospectively the Clarification Act affected rights of the seaman against the operating agent and others, or simply made sure that his [fol. 216] rights were enforceable against the Government. We make no suggestion in that respect. For this case, on the facts, is not governed by the statute's prospective operation."

Though Justice Rutledge made this statement, nevertheless a careful consideration of the entire reasoning of the opinion, as well as a consideration of the specially concurring opinion written by Mr. Justice Douglas, leads this Court to the conclusion that the Supreme Court of the United States has in fact determined that question, and in favor of the prospective operation of the Clarification Act.

It is this Court's conclusion that under the Hust decision, all seamen employed on a vessel operated by a steamship company under a General Agency Agreement such as is involved here, are employees of such General Agent; and may proceed at law and have a jury trial in all cases such as this, pursuant to the provisions of the Jones Act.

After a careful consideration of the evidence offered on this hearing, and having in mind all facts and circumstances existing at the time of and surrounding the execution of the General Agency agreement, and independently of the Hust decision, this Court would arrive at the same conclusions.

It follows, therefore, that the Court finds as a matter of law that the plaintiff at the time of the alleged injuries was an employee of the defendant within the meaning of the Jones Act, and, therefore, has the right to maintain this action for damages, and that will be the ruling of the Court.

To this ruling the Court allows the defendant an exception.

And, pursuant to the understanding between Court and counsel, it is also ordered that the entire record as made before the Court out of the presence and hearing of the [fol. 247] jury, including this statement of the Court, shall be incorporated into and made a part of the record on this trial before the jury, to all intents and purposes as though

the same had occurred and taken place after the selection of the present jury and in its presence and hearing.

SUBMISSION OF TESTIMONY ON QUESTIONS OF NEGLIGENCE AND  
EXTENT OF INJURY

“Thereupon a jury was convened and plaintiff submitted testimony on the questions of negligence and extent of injury as follows:

“That on June 8, 1943, plaintiff, a man then 35 years of age and in good health, signed articles at Portland, Oregon, as an able-bodied seaman on the S. S. George Davidson; that he sailed in this capacity with the vessel from Portland about June 13, 1943; that the voyage of the S. S. George Davidson was to San Pedro, California, thence to Hobart, Tasmania, thence to Bombay, to Cochin, India, to Colombo, Ceylon, to Freemantle, Australia, to Panama Canal Zone, to New York City, to Baltimore, where the crew was paid off;

“That at about 7:30 P. M., on August 2, 1943, while said vessel was at sea two days out of the port of Hobart, Tasmania, plaintiff was ordered by the boatswain on said vessel to dump overboard the contents of several garbage cans; that other seamen were then and there available to assist in said task, but were not ordered to do so;

“That the ship's garbage was disposed of by dumping it overboard; that this had to be done at dusk or after dark so as not to leave a trail for enemy submarines; that the garbage was contained in galvanized garbage cans about 3½ feet high and about 20 inches in diameter, with handles on each side; that on the S. S. George Davidson the garbage was emptied daily while at sea; that the duty of emptying the garbage was rotated among the various crew members and [fol. 218] one hour overtime wages was paid the crew member who performed the task;

“That on some Liberty ships which are equipped with a garbage chute one man usually dumps the garbage unassisted; that on other Liberty ships not equipped with a garbage chute sometimes one man performs the task and sometimes two men, depending upon whether the garbage cans to be emptied were full;

“That earlier in the voyage of the S. S. George Davidson and while the vessel was at sea after having departed from

the United States, the ship's delegate, who is a member of the unlicensed crew elected by the crew to handle any grievances of the crew with the ship's officers, was asked by the crew to talk to the master about the procedure of dumping the garbage; that the delegate complained to the master that the garbage cans were too heavy for one man to lift over the rail and asked that either the garbage be lightened by using more cans and not filling them so full, or that a "Handy-Billy" be rigged, or that the master permit two men to handle the garbage; that the master said that one man should dump the garbage, but that later a device called a "Handy-Billy" was rigged up, which consisted of one large empty oil drum used as a garbage can rigged over the side of the ship and which could be emptied by one man merely by untying the rope that held it; that when garbage accumulated in excess of what could be accommodated by the "Handy-Billy" it was placed in additional garbage cans as before which had to be dumped over the rail; that the master told the steward's department not to fill the garbage cans so full, but the steward's department failed to continue to abide by those directions and sometimes filled the additional cans full; that no authorization was ever given by the master for two men to dump the garbage;

[fol. 219] "That on the night of August 2, 1943, when plaintiff was told by the boatswain that it was his turn to dump the garbage, there were several full garbage cans, due to the garbage having accumulated while the vessel was in the port of Hobart, Tasmania; that plaintiff, in carrying out the order of the boatswain, attempted to lift a garbage can in order to dump the contents over the rail of the ship; that the garbage can weighed in excess of 150 pounds and was large and bulky in size, and there was a heavy sea running at the time and the deck was wet and the ship was rolling and pitching heavily; that as plaintiff was lifting said can, a sea rolled the ship and threw him off balance and threw the can back against him and his back gave way and he dropped the can and felt a severe pain in his back and had to be assisted back to his room, and that plaintiff remained in bed for many days during the voyage and suffered intermittent pain and disability to and including the time of trial, and that plaintiff, as a result of said accident, sustained a mild chronic back sprain of the lower back;

"After plaintiff rested his case, defendant moved for an involuntary nonsuit."

The Court: As to the first ground stated, let the record show that the Court still has in mind the entire record made upon the hearing before the Court and by stipulation made a part of this record, and adheres to its former ruling, denying the motion on that ground for the reason that the Court feels, under the law and the facts, that the defendant was at least an owner pro hac vice, and therefore responsible to plaintiff as an employer under the Jones Act.

As to the second ground urged, if occurs to the Court that the argument of counsel would be properly addressed to the jury as a matter of fact, and it does present a question of fact rather than a question of law. Though it is true that the plaintiff testified he was notified by the boatswain [fol. 220] that it was his turn to remove the garbage, that might well be understood and taken as an order, considering the nature of the business in which plaintiff was engaged, and the fact that they were at sea. Contributory negligence on the part of the plaintiff is not a defense and is not even pleaded in this case in mitigation of damages. There might be a question for submission to the jury whether the master—and in that respect I refer to the employer—owed a duty to the plaintiff to arrange for two men at all times to empty garbage under the circumstances existing here. If that was the duty of the employer, then a failure to perform that duty would be negligence on the part of the employer.

The Court feels that there is a question of fact here for the jury to determine, and therefore on the second ground urged the motion for an involuntary nonsuit will be denied and the defendant will be allowed an exception to the rulings of the Court.

"Thereupon defendant submitted its case on the question of negligence and extent of injuries."



JOHN W. DOPP was thereupon produced as a witness in behalf of the defendant herein and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wood:

Q. Tell the jury your full name, Captain.

A. John W. Dopp.

Q. Where do you reside?

A. My permanent address here on the Coast is San Francisco.

Q. But you are spending a good deal of time in Portland now, are you?

A. The last four and a half months I have been up here [fol. 221] in the Northwest because all of our ships have been coming in here.

Q. What has been your occupation?

A. Well, I have been following the sea for the last twenty-eight years.

Q. How old are you, Captain Dopp?

A. Forty-seven.

Q. What license do you hold for following the sea?

A. Third issue of master's license.

. . . . .

Q. Just describe the arrangement of the officers on a ship, who they are and what the complement of the crew is.

A. Well, the officers, each one has to have a license. Of course, that was waived during wartime. There is normally the master, chief mate, second mate, third mate, and some of the ships are carrying four mates, and then you carry a junior third mate.

Q. Now Captain, what are you now working as?

A. Port captain for the Shepard Steamship Company on the Pacific Coast.

Q. About how long have you been engaged in that occupation?

A. Since June of 1944.

. . . . .

Q. Who is the owner of the "George Davidson"?

A. The United States of America.

Q. And where was the ship built?

A. In Portland Oregon.

Q. At what shipyard, do you know?

A. Oregon Ship.

Q. Do you know who had the ship built?

A. The Maritime Commission.

Q. Do you know who designed that type of ship?

A. I think it is Gibson—it is on the front of those blueprints that you have there.

[fol. 222] Q. I mean did Shepard Steamship Company have anything to do with the design?

A. No.

Q. Now as I understand it, the Shepard Steamship Company were general agents?

A. Yes.

Q. Whom were they general agents for?

A. The War Shipping Administration or the United States Government.

Q. This was a new ship, was it; the "George Davidson"?

A. Yes, it was. We took it when it was new; that is, after it was completed at Oregon Ship it was given to us on a general agency agreement.

The Court: It was given "to us." Who do you mean?

A. The Shepard Steamship Company.

The Court: Very well.

A. It was allocated to the Shepard Steamship Company.

The Court: That is the defendant?

A. Yes.

The Court: Very well.

By Mr. Wood:

Q. So you or the Shepard Steamship Company then rendered service for the United States Government in connection with the operation of the ship?

A. That is right.

(Thereupon the Court and counsel retired to the Court's chambers and the following proceedings were had out of the presence and hearing of the jury):

### DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Wood: The defendant moves the Court for a directed verdict in favor of the defendant on the following grounds:

1. That the evidence shows as a matter of law that plain-[fol. 223] tiff was not an employee of the defendant within the meaning of the terms "employer" and "employee" used in the Jones Act, and that therefore the plaintiff has no right to maintain a suit under the Jones Act against this defendant.

2. On the ground that this defendant was not an employer within the meaning of the Jones Act of the plaintiff, and therefore plaintiff has no right to maintain this suit under the Jones Act against this defendant.

3. On the ground that there is no substantial evidence of defendant's negligence to go to the jury, since plaintiff's own evidence shows that there was an arrangement for members of the crew to assist each other in the emptying of the garbage, and the plaintiff made no request to the ship's officers or the boatswain or to the union delegate for additional help when it became his turn to empty the garbage on the day of the injury.

The Court: The motion is denied and exception allowed.

### INSTRUCTIONS OF THE COURT TO THE JURY

The Court: Members of the Jury, you have heard the evidence in this case, and it now becomes the duty of the Court to instruct you as to the law applicable to this situation.

In Paragraph I of the amended complaint the plaintiff sets forth the fact that the defendant is a corporation, and that on the 2nd day of August, 1943, the defendant was engaged in the control, navigation, management and operation and had in its possession certain merchant steamships operated in coastwise and foreign trade and commerce, and particularly on said date was in possession of, controlled, navigated, managed and operated a certain steamship known as the "SS George Davidson," and was responsible for [fol. 224] maintaining said steamship in proper repair and for equipping said vessel.

This Paragraph I of the complaint is denied by the defendant, except the part of it which alleges that the defendant is a corporation and has an office in Portland, Oregon. Now, the denial of the defendant of that particular allegation simply raises a question of law, and the Court has decided that question of law, and the allegation in the complaint and the denial raises no question of fact for the jury to determine and therefore you need not concern yourselves with the allegations of Paragraph I of the complaint. The Court decides as a matter of law, and so instructs you, that at the time of the alleged injuries the plaintiff was an employee of the defendant within the meaning of the law under which this case is being prosecuted.

\* \* \* \* \*

Now, in Paragraph VI there is just a formal allegation that the plaintiff brings this action under what is known as the Merchant Marine Act of 1920, Section 33, commonly known as the Jones Act, and he brings it in this county with a right of trial by jury. The Court has ruled as a matter of law that plaintiff has a right to prosecute the action under the Jones Act in this court before a jury, so there is no issue for you to determine upon the allegations of Paragraph VI of the complaint.

\* \* \* \* \*

Now, as I instructed you a moment ago, this action is brought under a law of the United States commonly known as the Jones Act, being Section 33 of the Merchant Marine Act of 1920, and which makes applicable to actions of this kind the law applying to railroad employees under the Federal Railroad Employees Act. I instruct you that in cases of employment requiring more than one worker to act in concert, it is the duty of the employer to provide a sufficient force to enable his employees to accomplish the [fol. 225] work assigned to them with reasonable safety to themselves, and if an injury results to an employee by reason of insufficiency in the number of his co-workers, he is entitled to maintain an action against his employer for any damages occasioned thereby.

Therefore, if in this case you find from a preponderance of satisfactory evidence that the employer, namely, the defendant, did not exercise reasonable and ordinary care



and prudence in assigning the number of employees which you find was actually necessary for safely doing the tasks required of plaintiff, and if you further find that the plaintiff was injured as a direct and proximate result of the defendant's failure in that regard, then the defendant in such event would be guilty of negligence and would be liable to the plaintiff for any injuries proximately caused thereby.

You are also instructed that the officers of the ship, including the captain, mates, and boatswain, were agents of defendant for the purpose involved in this case, and that any and all orders or directions given by such officers to seamen in regard to the disposal of garbage were therefore binding upon the defendant corporation, to the same effect as though given directly by the defendant. In other words, the officers were representatives of the defendant aboard ship, and if they were in any way guilty of negligence such negligence would be imputed to the employer and the employer would be responsible therefor.

Mr. Wood. The defendant excepts, your Honor, to the Court's instruction that the defendant was the employer of the plaintiff in this action, and defendant excepts—

The Court: Let me see if I can help you out on that. The Court allows the defendant an exception, first, to the Court [fol. 226] submitting this case to the jury at all. The Court also allows an exception to the defendant for each and every instruction given by the Court to the effect that the plaintiff was an employee of the defendant.

Mr. Wood: Thank you, your Honor. The defendant also excepts to the instruction that the captain, mates and boatswain were agents of the defendant. Your Honor probably intended to include those.

The Court: Yes. You may have an exception to that instruction. That is one of the requested instructions of the plaintiff, but I would have given it anyway, so you may have an exception to that. That is in keeping with your general theory in this case, and I want you to have an exception to everything that is in keeping with your legal theory in the case.

Mr. Wood: The defendant excepts to the instruction on the duty of the defendant to assign men to the work.

The Court: That is one of the requested instructions.

Mr. Wood: That was one of plaintiff's requested instructions.

The Court: You may have an exception.

Mr. Wood: It went on with an example of its application to this case.

The Court: I understand. You may have an exception.

[fol. 227]

[File endorsement omitted]

IN THE SUPREME COURT OF OREGON

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed August 25, 1948

To the Clerk of the above-entitled Court:

In order to enable plaintiff-respondent to apply for a writ of certiorari from the Supreme Court of the United States, it is respectfully requested that a transcript of the record of this cause be prepared, duly certified and authenticated, consisting of the following documents and portions of said record, showing the dates thereof:

1. First Amended Complaint;
2. Answer to First Amended Complaint;
3. Verdict;
4. Judgment of the Circuit Court of the State of Oregon for Multnomah County;
5. Motion for Judgment notwithstanding the Verdict, omitting the Alternative Motion for a New Trial and omitting the attached Affidavit of Erskine B. Wood, attached thereto (See Abstract, pages 10, 11, and first paragraph page 12);
6. Order denying the foregoing motions;
7. Opinion of the Circuit Court of the State of Oregon, dated October 5, 1946, omitting from page 2, beginning with the third paragraph (Abstract, p. 24, l. 11), to, but not omitting, the last paragraph of said opinion;
8. Notice of Appeal and Proof of Service thereof;
9. The Undertaking on Appeal shall be omitted, but a notation shall be included that such an undertaking was filed;

10. First Assignment of Error from Appellant's Brief;
11. Opinion of Oregon Supreme Court reversing judgment;
12. Petition for Rehearing;
13. Opinion of Oregon Supreme Court denying Petition for Rehearing;
14. Final Judgment and Mandate issued thereon by the Oregon Supreme Court;
15. Order Staying Execution and Enforcement of Judgment and Mandate;
16. Bill of Exceptions, including:

(a) Photostatic or otherwise certified copies of the following exhibits:

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13, and Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K and L, subject to the stipulation attached hereto;

(b) The following portions of the Transcript of Testimony:

. . . . .

[fol. 232] 17. This Praecipe and the appended Stipulation; and

18. Certificate of the Clerk of the Supreme Court of the State of Oregon.

Dated this 23rd day of August 1948.

Thomas H. Tongue, III, of Attorneys for Plaintiff-Respondent.

#### STIPULATION

It is stipulated that testimony relating to the issues of negligence and extent of injuries may be omitted and that the foregoing narrative statement may be inserted in lieu of plaintiff's testimony on said issues, and that there was sufficient evidence of damages and extent of injuries to sustain a verdict in an amount of \$9,000.00, the amount of the verdict entered herein.

It is further stipulated that, in view of the difficulty of preparing or securing copies of Plaintiff's Exhibits Nos. 1, 5, 6, 7, 8, 9, 10, 12 and 13, and Defendant's Exhibit No. A, the original copies of said exhibits may be included in [fol. 233] preparing the record of said cause in lieu of copies of said exhibits.

It is further stipulated that the foregoing designated portions of the record in this cause shall, subject to the reservation below, constitute the record on review, and that the omitted portions of the record have, as counsel are now advised, no bearing upon the issues to be presented upon the application for writ of certiorari; but this shall not preclude either counsel from suggesting a diminution of the record should any of said portions, in the opinion of counsel, become material.

Thomas H. Tongue, III, Of Attorneys for Plaintiff-Respondent.

Erskine B. Wood, Of Attorneys for Defendant-Appellant.

Service of a true copy of the foregoing praecipe and stipulation is accepted this 24th day of August, 1948.

Erskine B. Wood, Of Attorneys for Defendant-Appellant.

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[fol. 234] Clerk's Certificate to foregoing transcript omitted in printing.

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[fols. 235-236] DEFENDANT'S EXHIBIT "C"

War Shipping Administration, Washington

May 25, 1942.

Operations Regulation No. 1

Pertaining to Service Agreement for Vessels of Which the War Shipping Administration Is Owner or Owner Pro Hac Vice

Policy with Respect to Seagoing Personnel

Attached are copies of the following:

Statement of Policy dated Washington May 4, signed by the War Shipping Administration by representatives of the Master & Mates & Pilots of America, and the National Marine Engineers' Beneficial Association.

Statement of Policy dated Washington May 4, signed by the War Shipping Administration and by representatives of the Sailors Union of the Pacific, Marine Firemen, Oilers,



Article 3D. Where the Agent or General Agent and the Berth Sub-Agent both provide their own facilities in the United States port of loading or discharge, the duties provided in Article 3B shall be performed as directed by the United States.

Article 3E. In all cases, the Agent or General Agent shall:

(a) Order and pay for fuel after consultation with the Berth Sub-Agent, and follow such instructions with regard thereto as shall be issued by the United States from time to time;

(b) Make all necessary arrangements for transit of canals, including payment of canal tolls.

Article 3F. The Berth Sub-Agent agrees, without prejudice to its rights under the provisions of Articles 8 and 16 hereof, to:

(a) Perform the duties required to be performed by it hereunder in an economical and efficient manner, and exercise due diligence to protect and safeguard the interests of the Agent or General Agent and the United States in all respects and to avoid loss and damage of every nature to the Agent or General Agent and to the United States;

[fol. 274] (b) Exercise due diligence to see that all Bills of Lading are properly issued, all wharf receipts for freight are non-negotiable and, where required, a freight contract or permit is issued for each shipment;

(c) Furnish and maintain during the period of this Agreement, at its own expense, a bond with sufficient surety, in such amount as the United States shall determine, such bond to be approved by the United States as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the Berth Sub-Agent contained in this Agreement, including, without limitation of the foregoing, the condition faithfully to account to the United States through the Agent or General Agent for all funds collected and disbursed and funds and property received by the Berth Sub-Agent or its agents. The Berth Sub-Agent may, in lieu of furnishing such bond, pledge

Watertenders & Wipers Association, Seafarers International Union and the Marine Cooks & Stewards Association.

Letter dated May 8 addressed to Mr. Joseph Curren, President of the National Maritime Union of America by Captain Edward Macauley.

Statement of Policy dated Washington May 12, signed by the War Shipping Administration and by the National Maritime Union.

All General Agents are instructed to follow the policy outlined in the attachments with respect to seagoing personnel on vessels owned by or bareboat chartered to the War Shipping Administration and assigned to General Agents under General Agency Agreements.

(Sgd.) M. L. Wilcox, Director of Operations.

[fol. 237] (Masters, Mates & Pilots of America, Marine Engineers' Beneficial Assn., May 4, 1942)

### Statement of Policy

#### *I. Existing Collective Bargaining Agreements to Stand.*

Article 3 (d) of the Service Agreement signed between Agents and the War Shipping Administration under which Agents handle vessels owned by or bareboat chartered to the War Shipping Administration shall remain in force and effect. This article reads as follows:

“(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of

direct or fully guaranteed obligations of the United States of America of the face value of the penalty of the bond under an agreement satisfactory in form to the United States;

(d) Without the consent of the United States, not sell, assign or transfer, either directly or indirectly or through any reorganization, merger or consolidation, this Agreement or any interest therein, nor make any agreement or arrangement whereby the service to be performed hereunder is to be performed by any other person, whether an agent or otherwise, except as provided in Article 6 hereof.

Article 4. (a) To the extent required by the United States, the Berth Sub-Agent and every related or affiliated company or holding company of the Berth Sub-Agent, authorized as provided in Article 13 hereof, to render any service or to furnish any stores, supplies, equipment, provisions, materials, or facilities which are for the account of the United States, the Agent or the General Agent under the terms of this Agreement, shall (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States; and (2) file, upon notice from the United States, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which, in the opinion of the United States, affect the results in, the performance of, or transactions or operations under this Agreement.

(b) The United States is hereby authorized to examine and audit the books, records and accounts of all persons referred to above in this Article whenever it may deem it necessary or desirable.

(c) Upon the willful failure or willful refusal of any person described in this Article to comply with the provisions of this Article, the United States may rescind this Agreement.

Article 5. At least once a month the Agent or General Agent shall pay to the Berth Sub-Agent as full compensation for the Berth Sub-Agent's services hereunder, such

the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

The intention of this clause is that in order to make available the full supply of officers and men and to avoid favoritism as to conditions between one agent and another, with respect to preference of employment or use of union hiring halls, all agents will be required to procure officers and men in accordance with such conditions.

## II. *Wages and Working Conditions.*

It is hereby agreed that the provisions of existing collective bargaining agreements be continued and observed unless changed by mutual agreement between the War Shipping Administration and the unions, or in case of a [fol: 238] deadlock by decision of the Maritime War Emergency Board.

## III. *Discipline.*

The conditions aboard ship, including common hazard and peril, in war time require the highest standard of order and discipline. To accomplish this purpose, the unions agree to cooperate fully with the War Shipping Administration, as follows:

(1) Maintenance of the authority of the Master and of discipline, including strict and prompt enforcement of laws relating to conduct aboard ship.

(2) Elimination of crews' mass meetings, crews' committees and other similar meetings or groups aboard ship. However, one man in each department will be recognized as the spokesman for that department, but all disputes shall be settled only upon termination of the voyage in a continental port of the United States pursuant to procedures laid down in the collective bargaining agreements.

(3) Without waiving the right to strike, the unions hereby give firm assurance and guarantee that the exercises of this right will be absolutely withheld for the duration of the war:



fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine. Such compensation shall be deemed to cover, but without limitation, the Berth Sub-Agent's administrative and general expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, tax (other than taxes for which the Agent is reimbursed under Article 7 hereof), and any other expenses which are not directly and exclusively applicable to the operation of the vessels hereunder.

[fol. 275] Article 6. The Berth Sub-Agent shall exercise due diligence in the selection of agents. Such agents shall be subject to disapproval by the United States and any agency agreements shall be terminated by the Berth Sub-Agent whenever the United States shall so direct. Any compensation payable by the Berth Sub-Agent to its agents for services rendered in connection with the vessels assigned hereunder shall be subject to approval by the United States. Agency fees or equivalent allowances for branch offices in accordance with schedules approved by the United States will be reimbursable under Article 7 hereof.

Article 7. The Agent or General Agent shall reimburse the Berth Sub-Agent at stated intervals determined by the United States for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classified as voyage expenses for the account of the United States) and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. The Berth Sub-Agent shall be reimbursed for sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses for the account of the United States to the extent that the Berth Sub-Agent shall have used due diligence to secure immunity from such taxation. The United States, the Agent or the General Agent may disallow, in whole or in part, as it may deem appropriate, and deny reimbursement for, expenses

#### IV. *Duration.*

The above provisions shall apply on all vessels of the United States Merchant Marine, owned by or bareboat chartered to The War Shipping Administration as long as the War Shipping Administration has jurisdiction of vessels of the American Merchant Marine.

On behalf of the National Organization of Masters, Mates and Pilots of America, (Sgd.) James J. Delaney. On behalf of the National Marine Engineers' Beneficial Association, (Sgd.) S. J. Hogan, E. S. Land; Edward Macauley, for the War Shipping Administration; William Radner.

Dated May 4, 1942, Washington, D. C.

[fol. 239] (Pacific Coast Seamen, Firemen, and Cooks and Stewards—May 4, 1942.)

#### Statement of Policy

##### I. *Existing Collective Bargaining Agreements to Stand.*

Article 3(d) of the Service Agreement signed between Agents and the War Shipping Administration under which Agents handle vessels owned by or bareboat chartered to the War Shipping Administration shall remain in force and effect. This article reads as follows:

“(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the

which are found to have been made in willful contravention of any outstanding instructions or which were clearly improvident or excessive.

Any moneys advanced to bonded persons by the Berth Sub-Agent for ship disbursements which are lost by reason of a casualty to the Vessel on which the money so advanced is carried shall in the event of such loss be considered an expense of the Berth Sub-Agent, subject to reimbursement as is in this Article 7 provided.

The United States, the Agent, or the General Agent may advance moneys to the Berth Sub-Agent to provide for disbursements hereunder in accordance with such regulations or conditions as the United States, the Agent or the General Agent may from time to time prescribe.

Article 8. The United States shall without cost or expense to the Berth Sub-Agent procure or provide insurance against, or shall assume, all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage caused to other vessels, persons or property, and shall defend, indemnify and save harmless the Berth Sub-Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance. The Berth Sub-Agent shall furnish reports and information and comply fully with all instructions that may be issued by the United States with regard to all salvage claims, damages, losses or other claims. Neither the United States nor the insurance underwriters shall have any right of subrogation against the Berth Sub-Agent with respect to such risks.

Article 9. In the event of general average involving vessels assigned to the Berth Sub-Agent under this Agreement, the Berth Sub-Agent shall comply fully with all instructions issued by the United States, the Agent or the General Agent in that connection including instructions [fol. 276] as to the appointment of adjuster, obtaining general average security and asserting liens for that purpose unless otherwise instructed, and supplying the adjuster with all disbursements accounts, documents and data required in the adjustment, statement and settlement of the

orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

The intention of this clause is that the General Agent will procure and make available to the Master for engagement by the Master, officers and men through the channels which the Agent has heretofore used for his own merchant ships. If the General Agent has contracts with unions and those contracts require for example preference of employment or use of union hiring halls, the Agent would be required to procure men in accordance with contracts.

## II. *Wages and Working Conditions.*

Inasmuch as base wages, emergency wages, overtime rates, bonuses, war risk compensation, repatriation and allotment conditions have been generally equalized in East Coast, West Coast and Gulf Collective Bargaining Agreements [fol. 240] which agreements have established equitable practices and standards in manning the American Merchant Marine now necessary to furtherance of the war efforts, it is therefore agreed that the existing collective Bargaining Agreements be frozen for the duration of the war.

## III. *Discipline.*

The conditions aboard ship, including common hazard and peril, in wartime require the highest standard of order and discipline. To accomplish this purpose, the unions agree to cooperate fully with the War Shipping Administration, as follows:

(1) Maintenance of the authority of the Master and of discipline including strict and prompt enforcement of laws relating to conduct aboard ship.

(2) Elimination of crews' mass meetings, crews' committees and other similar meetings or groups aboard ship. However, one man in each department will be recognized as the spokesman for that department, but all disputes shall be settled only upon termination of the voyage in port where shipping articles are closed.

(3) It is understood that all disputes will be settled through the regular machinery now in existence under



the collective bargaining agreements between the unions and the steamship operators.

(4) Without waiving the right to strike, the unions hereby give firm assurance and guarantee that the exercise of this right will be absolutely withheld for the duration of the war.

#### IV. *Duration.*

This Statement of Policy will remain in effect as long as the War Shipping Administration has jurisdiction of vessels of the American Merchant Marine.

(Sgd.) E. S. Land; Edward Macauley, for the War Shipping Administration; Harry Lundeberg, Secretary-Treasury, S. U. P. President, S. I. U.; John Hawk, Secretary-Treasurer, Atlantic & Gulf District, Seafarer's International Union; V. J. Malone, Secretary, Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Assn.; James W. Burke, Secretary, Marine Cooks & Stewards Assn.

Dated May 4, 1942, Washington, D. C.

[fol. 241]

May 8, 1942.

Mr. Joseph Curran, President, National Maritime Union of America, 346 West 17th Street, New York, New York.

DEAR MR. CURRAN:

I have your letter of May 7, 1942, asking for clarification of the Statement of Policy on certain points. You know the controversy which has been going on about the Navy taking over the Merchant Marine and about adoption of uniform Rules and Regulations to supplant the existing collective bargaining agreements. It is against this background that the Statement of Policy has been put forth. I want to emphasize that it is a statement of policy and not a set of rules. There are therefore many details which will have to be worked out in the light of the Statement of Policy as we go along. This I am sure we shall be able to do effectively and in a cooperative spirit.

Question No. 1: What guarantee is there in those proposals that the open shop is not frozen and that our right

to organize in unorganized steamship companies will not be impaired?

Answer: The subject is not covered by the Statement of Policy: whatever your rights may be in this respect, those rights remain unaffected by the Statement of Policy.

Question No. 2: Does this Statement of Policy propose that the union shall not be able to seek collective bargaining agreements with unorganized steamship companies after they have been organized?

Answer: No.

Question No. 3: In section 3, under Discipline, paragraph 2, does the elimination of crews' mass meetings, crews committees, and other similar meetings for groups aboard ship, comprehend that there shall be no meetings permitted aboard ship. For example, we have now and are promoting safety meetings aboard ship, and meetings having as their basis the teaching of newly trained seamen in the art of seamanship between their watches.

Answer: As paragraph (1) in Section 3 under the heading "Discipline" indicates, it is considered sound policy under war conditions that the authority of the Master be strictly maintained. Paragraph 3 contemplates that no meetings be permitted aboard ship "where they tend in any way to interfere with the ship's operation"; and of this the [fol. 242] Master must be the judge. If there may be some Masters who will abuse their discretion in this regard, it is thought better in view of war conditions to remedy abuse ashore rather than to have arguments and disputes aboard ship whether a given meeting "interferes with the ship's operation." Should any such abuses develop, the War Shipping Administration will remedy them.

Question No. 4: In the same paragraph, will we be able to have meetings for the purpose of electing the spokesmen? Under our constitution, spokesmen for departments or ships must be elected at ships' meetings.

Answer: Since the Statement of Policy contemplates recognition of a spokesman for each department, ships meetings may be held for the purpose of electing spokesmen as long as they don't interfere with the ships' operation.

Question No. 5: We are concerned with the fact that there is rumor that such spokesmen are to take the place of union officers. In other words, when the vessel arrives in United

general average. Reasonable compensation for and general average allowances to the Berth Sub-Agent in such cases shall be in accordance with directions, orders or regulations of the United States. This Article shall not apply to services required of the Owner under Time Charter.

Article 10. The negotiation and settlement of all salvage claims for services rendered by vessels shall be controlled by the Owner and the United States in accordance with the provisions of the applicable Time Charter. The Berth Sub-Agent shall furnish the United States, the Agent or the General Agent with full reports and information on all salvage services rendered.

Article 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the Berth Sub-Agent and to assume control forthwith of the business of said vessels upon fifteen (15) days' written or telegraphic notice.

(b) Upon giving to the United States thirty (30) days' written or telegraphic notice, the Berth Sub-Agent shall have the right to terminate this Agreement, but termination by the Berth Sub-Agent shall not become effective as to any vessel until her arrival and discharge at a continental United States port.

(c) This Agreement may be terminated, modified, or amended at any time by mutual consent.

Article 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, all property of whatsoever kind then in the custody of the Berth Sub-Agent pursuant to this Agreement, shall be immediately turned over to the United States, the Agent or the General Agent at times and places to be fixed by the United States, and the United States, the Agent or General Agent may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid: Provided, That the Berth Sub-Agent shall, if required by the United States, adjust, settle and liquidate the current business of the vessels. Notwithstanding the foregoing provisions, when the United States shall so direct, the Berth Sub-Agent shall complete the business of voyages commenced prior to the date as of which the Agreement shall be terminated, and, if directed by the United States and subject to any instructions issued by the

States ports, will the practice that is contained in our contracts for union officials to board the vessel to meet with the crew for the purpose of taking up any problems they may have continue, or does this Statement of Policy comprehend the elimination of that policy?

Answer: Section 2 of the Statement of Policy explicitly provides that the provisions of existing collective bargaining agreements be continued and observed. Whatever your contractual rights may be in respect of your officials boarding vessels, those rights remain unaffected.

Question No. 6: It is the feeling of our officers that there is lack of clarity on one or more important question. If the agents that the union now has contracts with were eliminated and new agents established who did not have previous relationship with the union, would that eliminate our contracts or would the War Shipping Administration, through Section 2, continue our collective bargaining contracts in that event?

Answer: There is no intention and the War Shipping Administration is committed not to "eliminate" the agents who now have contracts with the union. On the other hand, the War Shipping Administration must have full freedom to reallocate vessels from one service to another as the needs of the war effort may require and change agents accordingly; it being the settled policy of the War Shipping Administration to assign vessels in a particular service [fol. 243] to agents who have been operating in that service. The War Shipping Administration will under no circumstances use this freedom of action for the purpose of favoring agents who do not have relationships with the unions, against those who have.

To the extent that this question touches the matter of pools about which you have given me your views in your letter of May 1, 1942, the answer must be subject to whatever comprehensive plan may be formulated in that regard. Such a plan will make provision for the continuation of the unions as a source of supply of officers and men.

Very truly yours, (Sgd.) Edward Macauley; Assistant to the Administrator, War Shipping Administration.



United States with respect thereto, the Berth Sub-Agent shall continue to book cargo for the vessels for the next voyages after the termination of this Agreement. No such termination of this Agreement shall relieve either party of liability to the other in respect of matters arising prior to the date of such termination or of any obligation hereunder to indemnify the other party in respect of any claim or demand thereafter asserted, arising out of any matter done or omitted prior to the date of such termination.

Article 13. Agreements or arrangements with any interested or related company to render any service or to furnish any stores, supplies, equipment, materials, or facilities shall be submitted to the United States for approval as to employment. Unless and until such agreements or arrangements have been approved by the United States, compensation paid to any interested or related company shall be subject to review and readjustment by the United States. In connection with such review and readjustment, the United States may deny reimbursement hereunder of any portion of such compensation which it deems to be in excess of fair and reasonable compensation. The United States may also deny reimbursement, in whole or in part, of compensation under any arrangement or agreement with an interested or related company which it deems to be exorbitant, extortionate or fraudulent. The term "interested company" shall mean any person, firm, or corporation in which the Berth [fol. 277] Sub-Agent, or any related company of the Berth Sub-Agent, or any officer or director of the Berth Sub-Agent, or any employee of the Berth Sub-Agent who is charged with executive or supervisory duties, or any member of the immediate family of any such officer, director or employee, or any officer or director of any related company of the Berth Sub-Agent, or any member of the immediate family of an officer or director of any related company of the Berth Sub-Agent, owns any substantial pecuniary interest directly or indirectly. The term "related company", used to indicate a relationship with the Berth Sub-Agent for the purposes of this Article only, shall include any person or concern that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the Berth Sub-Agent. The term "control" (including the terms "controlled by" and "under common control with") as used herein means the possession, directly or indirectly, of the power to direct or

## Statement of Policy

### I. *Existing Collective Bargaining Agreements to Stand.*

Article 3 (d) of the Service Agreement signed between Agents and the War Shipping Administration under which Agents handle vessels owned by or bareboat chartered to the War Shipping Administration shall remain in force and effect. This article reads as follows:

"(d) The General Agent shall procure the Master of the vessels operated hereunder subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be [fol. 244] paid in the customary manner with funds provided by the United States hereunder."

The intention of this clause is that in order to make available the full supply of officers and men and to avoid favoritism as to conditions between one agent and another, with respect to preference of employment or use of union hiring halls, all agents will be required to procure officers and men in accordance with such conditions.

### II. *Wages and Working Conditions.*

It is hereby agreed that the provisions of existing collective bargaining agreements be continued and observed for the duration of the war unless changed by mutual agreement between the War Shipping Administration and the unions, or in case of a deadlock by decision of the Maritime War Emergency Board.

cause the direction of the management and policies of the Berth Sub-Agent (or related company), whether through ownership of voting securities, by contract, or otherwise.

Article 14. This Agreement, unless sooner terminated, shall extend until six months after the cessation of hostilities.

Article 15. The United States shall, when it may legally do so, have the advantage of any existing, or future, contracts of the Agent for the purchase or rental of materials, fuel, supplies, facilities, services, or equipment, if this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the Berth Sub-Agent.

Article 16. (a) The United States shall indemnify, and hold harmless and defend the Berth Sub-Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the Berth Sub-Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, and claims for damages for personal injury or loss of life.

(b) The Berth Sub-Agent shall be under no responsibility or liability to the United States, the Agent or the General Agent for loss or damage to the vessels arising out of any error of judgment or any negligence on the part of any of the Berth Sub-Agent's officers, agents, employees, or otherwise. However, the Berth Sub-Agent may be held liable for loss or damage not covered by insurance or assumed by the United States as required under Article 8 of this Agreement, if such loss or damage is directly and primarily caused by wilful misconduct of principal supervisory shore-side personnel or by gross negligence of the Berth Sub-Agent in the selection of such principal supervisory personnel.

### III. *Discipline.*

The conditions aboard ship, including common hazard and peril, in war time require the highest standard of order and discipline. To accomplish this purpose, the unions agree to cooperate fully with the War Shipping Administration, as follows:

(1) Maintenance of the authority of the Master and of discipline including strict and prompt enforcement of laws relating to conduct aboard ship.

(2) Elimination of crews' mass meetings, crews' committees and other similar meetings or groups aboard ship where they tend in any way to interfere with the ship's operation. However, one man in each department will be recognized as the spokesman for that department, but all disputes shall be settled only upon termination of the voyage in a continental port of the United States pursuant to procedures laid down in the collective bargaining agreements.

(3) Without waiving the right to strike, the unions hereby give firm assurance and guarantee that the exercise of this right will be absolutely withheld for the duration of the war.

### [fols. 245-246] IV. *Duration.*

The above provisions shall apply on all vessels of the United States Merchant Marine, owned by or bareboat chartered to the War Shipping Administration as long as the War Shipping Administration has jurisdiction of vessels of the American Merchant Marine.

On behalf of the National Maritime Union of America, (Sgd.) Joseph Curran, President; E. S. Land, Edward Macauley, for the War Shipping Administration. William Radner.

Dated May 12, 1942, Washington, D. C.



(c) In the event that the Berth Sub-Agent shall perform any stevedoring, terminal, or similar service for the vessels hereunder at commercial rates, the Berth Sub-Agent shall have all the obligations and responsibilities of the person performing such service under the standard or other approved form of contract with the United States or, in the absence of such standard or approved form, under usual commercial practice.

(d) The Berth Sub-Agent shall be under no liability to the United States, the Agent or the General Agent of any kind or nature whatsoever in the event that the Berth Sub-Agent should fail to perform any service hereunder by reason of any labor shortage, dispute or difficulty, or any [fol. 278] strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the Berth Sub-Agent whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities.

(e) The Agent or General Agent shall not be held responsible for acts of a Berth Sub-Agent expressly appointed by or at the direction of the United States.

Article 17. Wherever and whenever herein any right, power, or authority is granted or given to the United States, such right, power, or authority may be exercised in all cases by the War Shipping Administration or such agent or agents as it may appoint or by its nominee, and the act or acts of such agent or agents or nominee, when taken, shall constitute the act of the United States hereunder. In performing its services hereunder, the Berth Sub-Agent may rely upon the instructions and directions of the Administrator, the Agent or the General Agent, his officers and responsible employees, or upon the instructions and directions of any person or agency authorized by the Administrator. Wherever practicable, the Berth Sub-Agent shall request written confirmation of any oral instructions or directions so given.

Article 18. (a) ~~The Berth Sub-Agent warrants that it has not employed any person to solicit or secure this agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this Agreement or in its discretion to deduct from any amount payable here-~~

## Title 46—Shipping

## Chapter IV—War Shipping Administration

## Part 306—General Agents and Agents

## General Order No. 21

Whereas, by Executive Order No. 9054, dated February 7, 1942, the President established the War Shipping Administration to assure the most effective utilization of the shipping of the United States for the successful prosecution of the war; and

Whereas, the United States of America, acting by and through the Administrator, War Shipping Administration; has appointed certain Agents and General Agents, and will from time to time appoint additional ones, to conduct the business of vessels assigned to such agents under forms of Service Agreements (TCA-4/4/42 and GAA-4/4/42), approved by the Administrator on April 8, 1942, and

Whereas, it is desirable for Agents and General Agents to appoint Berth Sub-Agents to perform the functions of the Agent or General Agent under certain circumstances; and

Whereas, the Administrator deems it appropriate to issue the following Order concerning the handling of vessels assigned to Agents and General Agents under Service Agreements, and the appointment of Berth Sub-Agents by Agents and General Agents;

Now, therefore, it is hereby ordered that:

306.43 *Definitions*—The Terms "Agent" (Sec. 306.4), "General Agent" (Sec. 306.3), "Berth Sub-Agent" (Sec. 306.5 (a)), and "Sub-Agent" (Sec. 306.5(b)) as defined in General Order No. 12, as amended, shall have the same meaning in this Order.

306.44 *Service Agreements (GAA-4/4/42)*—Service Agreements entered into between the United States of America, acting by and through the Administrator, War Shipping Administration, with shipping companies appointing them as General Agents to manage and conduct the business of vessels (excluding tankers, small craft, salvage and rescue vessels, tugs and barges, and other vessels from time to time excluded with the approval of the Administra-

tor) of which the War Shipping Administration is Owner or Owner Pro Hac Vice, and assigned to the General Agents by the United States from time to time, shall be as follows:

[fol. 271] 306.46 *Berth Sub-Agent Service Agreement* (BSA-9-22-42)—Unless otherwise determined by the Administrator, when vessels assigned to an Agent or General Agent are required for operation on voyages in services in which an operator of United States Flag vessels is recognized by War Shipping Administration as a regular berth operator, such operator will be designated by the War Shipping Administration as the Berth Sub-Agent of the Agent or General Agent.

The provisions of this section 306.46 are hereby made retroactive so as to become effective as to vessels time chartered by the Administration from the date of delivery of the vessels to the Administration and as to vessels owned or bareboat chartered by the Administration from the date of delivery of the vessels to the General Agent.

Service Agreements entered into between the United States of America, acting by and through the Administrator, War Shipping Administration, with berth operators approved by the Administration, appointing such berth operators as Berth Sub-Agents to conduct the business of vessels assigned to them from time to time by the United States, an Agent or General Agent, shall be as follows:

[fol. 272] BSA (Approved 9-22-42) , Contract WSA

#### Agreement Between the War Shipping Administration and Berth Sub-Agents of Agents or General Agents

Whereas, the United States of America (herein called the "United States") acting by and through the Administrator, War Shipping Administration, has entered into service agreements (GAA and TCA) with certain companies designating such companies as Agent or General Agent to conduct the business of vessels assigned to such agents by the United States from time to time, and

Whereas, when vessels assigned to an Agent or General Agent are required for operation on voyages in services in which an operator of United States flag vessels is recognized by War Shipping Administration as a regular berth operator, such operator will be designated by War Shipping Administration as the Berth Sub-Agent of the Agent or General Agent; and

Whereas, the United States has designated —, a — corporation, having its principal place of business at —, (herein called the "Berth Sub-Agent") as eligible for appointment by Agents and General Agents as a Berth Sub-Agent.

Now, therefore, the United States and the Berth Sub-Agent, in consideration of the reciprocal undertakings and promises of the parties herein expressed, agree that the following provisions shall govern the rights and obligations of the United States and the Berth Sub-Agent, while the Berth Sub-Agent is performing services as Berth Sub-Agent at the request of the United States, an Agent or General Agent:

Article 1. The United States appoints the Berth Sub-Agent as its sub-agent and not as an independent contractor, to conduct the business of vessels assigned to it by the United States or by an Agent or General Agent, from time to time.

Article 2. The Berth Sub-Agent accepts the appointment and undertakes and promises so to conduct the business for the United States, in accordance with such directions, orders, or regulations as the United States has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States or by an Agent or General Agent assigned to the Berth Sub-Agent for that purpose.

Article 3A. Unless otherwise directed by the United States, the Berth Sub-Agent in all cases shall, to the best of its ability, for the account of the Agent or General Agent:

(a) Book the cargo and expedite its delivery alongside ship. Issue or cause to be issued to shippers customary freight contracts and bills of lading in the form prescribed by the United States, and prepare manifests and other cargo documents;

(b) Where appropriate, issue or cause to be issued to passengers customary passenger tickets. After a uniform passenger ticket shall have been adopted by the United States, such passenger ticket shall be used in all cases as soon as practicable after receipt thereof by the Berth Sub-Agent. Pending the issuance of such uniform passenger ticket, the Berth Sub-Agent may



continue to use the customary form of passenger ticket of the Agent or General Agent;

[fol. 273] (c) Collect all moneys due the United States and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the Agent or General Agent for all moneys collected or disbursed by it or its agents;

(d) Appoint sub-agents at foreign and intermediate ports of call for the receipt or delivery of cargo;

(e) Pay agency fees, port charges, and cargo expenses in foreign ports;

(f) Adjust cargo claims;

(g) Render accounts to and keep the Agent or General Agent fully informed as to the various activities being performed.

Article 3B. Where the Agent or General Agent does not provide his own facilities in the United States port of loading or discharge, and when not otherwise directed or approved by the United States, the Berth Sub-Agent shall, to the best of its ability for the account of the Agent or General Agent:

(a) Receive and deliver the cargo; provide and pay for stevedoring and other cargo handling expenses, port charges, wharfage and dockage, pilotage, commissions, and consular charges, except those pertaining to the master, officers and crew of time chartered vessels, and all other expenses in connection with the handling of the cargo.

Article 3C. Where the Agent or General Agent provides his own facilities in the United States port of loading or discharge, and when not otherwise directed or approved by the United States, the Agent or General Agent shall perform the duties provided in Article 3B, and the Berth Sub-Agent shall be relieved of those responsibilities, but the Berth Sub-Agent shall have the right to employ a Head Receiving or Delivery Clerk to supervise the operation of receiving and delivering cargo.

under the amount of such commission, percentage, brokerage or contingent fee.

(b) In any act performed under this Agreement, the Berth Sub-Agent and any subcontractor shall not discriminate against any citizen of the United States of America on the ground of race, creed, color or national origin.

Article 19. No person elected or appointed a member of or delegate to Congress or a Resident Commissioner, directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account shall hold or enjoy this Agreement in whole or in part, except as provided in Section 206, Title 18, U. S. C. The Berth Sub-Agent shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

In Witness Whereof, the parties hereto have executed this Agreement in triplicate as of

United States of America, by E. S. Land, Administrator, War Shipping Administration, by \_\_\_\_\_,  
for the Administrator.

Attest: \_\_\_\_\_.

Approved as to form: \_\_\_\_\_ General Counsel, War Shipping Administration.

[foE 279] 306.47 *Appointment of Berth Sub-Agents*—An Agent or General Agent, after being so directed by War Shipping Administration, in appointing a Berth Sub-Agent shall do so by letter or telegram to the appointee, stating that the appointment is made pursuant to the provisions of this Order, and that the Berth Sub-Agent shall perform his duties on behalf of the Agent or General Agent in accordance with the provisions of the form of agreement set forth in section 306.46 of this Order which shall be incorporated in the notification of appointment by referring to this General Order, and the Berth Sub-Agent shall by letter or telegram accept the appointment. The effective date of the agreement between the parties shall be the date upon which the notification of acceptance of the appointment is dispatched by the Berth Sub-Agent, or as otherwise agreed by the parties with the approval of the Administrator.

(Sgd.) E. S. Land, Administrator, War Shipping Administration.

September 22, 1942.



# PARTICULARS OF ENGAGEMENT

(212)

REFERENCE NO.	SIGNATURE OF SEAMAN	BIRTHPLACE (If foreign-born, but naturalized, insert NAT. in parenthesis after country of birth)	AGE	HEIGHT		COMPLEXION	HAIR	NUMBER OF CONTINU- OUS DIS- CHARGE BOOK OR CERTIFI- CATE OF IDENTIFI- CATION	SERIAL NUMBER OF LICENSE OR CERTIFI- CATE	IN WHAT CAPACITY	WAGES <sup>1</sup>		PLACE AND DATE OF SIGNING THIS AGREEMENT		TIME AT WHICH TO BE ON BOARD	MONTHLY ALLOTMENTS	
				FT.	IN.						Per month	Rate per hour overtime	Place	Date		Amount	Payable to—
1	<i>William S. Oakes</i> WILLIAM S. OAKES			540	14	7382											
2	<i>William S. Oakes</i> LINTON A. NEWELL, JR.	Ida	34	5	6	R	Blk	3-16224	71598	Chief Mate	\$220 00		Vancouver, Wn.	6-8-43	6-8-43		Mrs. L. A. Newell (Wife)
3	<i>Linton A. Newell Jr.</i> CLAUDE L. TAYLOR	Ore.	35	5	10	Wk	Br	3-14311	78255	2nd Mate	213 50		"	"	6-8-43	150 00	Mrs. L. A. Newell (Wife)
4	<i>Claudet Taylor</i> WILLIAM J. WATMAN	Ida	42	5	10 1/2	R	Br	3-222143	78404	3rd Mate	193 75		"	"	6-8-43	175 00	Mrs. L. A. Newell (Wife)
5	<i>Alfred J. Walman</i> JOHN S. WALMACEY	Iowa	23	6	1	St	Br	3-11038	E-372842	Radio Op.	178 50		"	"	6-8-43	50 00	Mrs. Mary Walman (Wife)
6	<i>John S. Walman</i> GEORGE R. JOHNSON	Ireland	41	5	5	St	Br	3-254130	E-420901	Yeoman	137 50		"	"	6-8-43		
7	<i>George R. Johnson</i> DONALD R. JOHNSON	Ore.	28	5	10	St	Blk	3-222130	E-326229	Toolbox Carpenter	7 50		"	"	6-8-43		
8	<i>Donald R. Johnson</i> FRED W. FINK	Calif	22	5	11	St	Br	3-280135	E-113228	Boatswain	112 50		"	"	6-8-43	100 00	Mrs. Fred Johnson (Wife)
9	<i>Fred W. Fink</i> STEPHEN E. SULLIVAN	Neb.	34	5	11	R	Blk	3-351110	D-91943	Able Seaman	100 00		"	"	6-8-43	50 00	Mrs. Fred Johnson (Wife)
10	<i>Stephen E. Sullivan</i> JOHN E. HALL	Mo.	19	5	10 1/2	St	Br	3-190881	D-40445	Able Seaman	100 00		"	"	6-8-43	60 00	Mrs. Fred Johnson (Wife)
11	<i>John E. Hall</i> WALTER R. ANDERSON	Wash.	19	5	11	St	Br	3-293137	E-376674	Able Seaman	100 00		"	"	6-8-43	70 00	Mrs. Fred Johnson (Wife)
12	<i>Walter R. Anderson</i> GLENN A. SHOOK	Ida	28	5	8	St	Blk	3-292034	B-91896	Able Seaman	100 00		"	"	6-8-43	100 00	Mrs. Fred Johnson (Wife)
13	<i>Glenn A. Shook</i> GEORGE D. BRUMLEY, JR.	Ida	30	5	11 1/2	St	Blk	3-258119	E-320483	Able Seaman	100 00		"	"	6-8-43		
14	<i>George D. Brumley Jr.</i> MELVIN L. MOELLING	Kans.	21	5	8 3/4	St	Br	3-294652	D-131947	Able Seaman	100 00		PORTLAND, ORE.	6-11-43	6-8-43		
15	<i>Melvin L. Moelling</i> LUTHER B. WILLIAMS, JR.	Mo.?	25	5	7	R	Br	3-192034	E-437411	Ord. Seaman	82 50		Vancouver, Wn.	6-8-43	6-8-43	60 00	Mrs. Frank Williams (Wife)
16	<i>Luther B. Williams Jr.</i> WILLIE FRAZIER	Ida	30	5	2	R	Br	3-268217	E-402544	Ord. Seaman	82 50		"	"	6-8-43	75 00	Mrs. Frank Williams (Wife)
17	<i>Willie Frazier</i> WILLIE FRAZIER	Ida	21	5	11	St	Br	3-368715	E-402545	Ord. Seaman	82 50		"	"	6-8-43	75 00	Mrs. Frank Williams (Wife)
18										Deck Cadet	82 50						
19																	
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33	<i>Thomas C. Price</i> THOMAS C. PRICE	Mo.	42	6	4	St	St	154059	MASTER								

<sup>1</sup> Enter rate per month and rate per hour for overtime, as both items constitute wages.



Notice is hereby given that section 4519 of the U. S. Revised Statutes (U. S. C., title 46, sec. 577) makes it obligatory on the part of the master of a merchant vessel of the United States, at the commencement of every voyage or engagement, to cause a legible copy of the agreement (forecastle card), omitting signatures, to be placed or posted up in such part of the vessel as to be accessible to the crew, under a penalty not exceeding ONE HUNDRED DOLLARS.

ARTICLES OF AGREEMENT BETWEEN MASTER AND SEAMEN IN THE MERCHANT SERVICE OF THE UNITED STATES  
Required By Act of Congress, Title LIII, Revised Statutes of the United States (U. S. C., title 46, chap. 18)

NAME OF SHIP	OFFICIAL NO.	PORT OF REGISTRY	DATE OF REGISTER	REGISTERED TONNAGE		VOYAGE NO.
				Gross	Net	
GEORGE DAVIDSON	249491	Portland, Oregon	6-8-43	7176	4380	81
REGISTERED MANAGING OWNER OR MANAGER			NUMBER OF SEAMEN AND APPRENTICES FOR WHICH ACCOMMODATION IS CERTIFIED		CLASS OF SHIP	
Name War Shipping Administration (Owner) Shepard Steamship Co. (Gen. Agents)			Address (State number of house, street and town) Washington, D. C. 40 Central St., Boston, Mass.		36 Steam-Freight	

Office of the U. S. SHIPPING COMMISSIONER FOR THE PORT OF Portland, Oregon - June 8, 1943

IT IS AGREED between the Master and seamen, or mariners, of the S.S. "GEORGE DAVIDSON" of Portland, Oregon of which Thomas C. Price is at present Master, or whoever shall go for Master, now bound from the Port of Vancouver, Washington, to a point in the Pacific Ocean to the westward of Vancouver, Washington, and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any Department, Commission or Agency, thereof on the Pacific Coast and back to a final port of discharge in the United States, for a term of time not exceeding NINE (9) calendar months.

GOING ON SHORE IN FOREIGN PORTS IS PROHIBITED EXCEPT BY PERMISSION OF THE MASTER  
NO DANGEROUS WEAPONS OR Grog ALLOWED, AND NONE TO BE BROUGHT ON BOARD BY THE CREW

SCALE OF PROVISIONS to be allowed and served out to the Crew during the voyage in addition to the daily issue of lime and lemon juice and sugar, or other antiscorbutics in any case required by law

	Sun-day	Mon-day	Tues-day	Wednes-day	Thurs-day	Fri-day	Satur-day		Sun-day	Mon-day	Tues-day	Wednes-day	Thurs-day	Fri-day	Satur-day
Water.....	quarts 5	5	5	5	5	5	5	Coffee (green berry).....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Biscuit.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Tea.....	ounce 3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2
Beef, salt.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Sugar.....	ounce 3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2
Pork, salt.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Molasses.....	pint 3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2
Flour.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Dried fruit.....	ounce 3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2
Canned meat.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Pickles.....	pint 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Fresh bread.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Vinegar.....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Fish, dry, preserved, or fresh.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Corn meal.....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Potatoes or yams.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Lard.....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Canned tomatoes.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Butter.....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Peanut butter.....	pint 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Mustard, pepper, and salt sufficient for seasoning.....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Beans.....	pint 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2								
Rice.....	pint 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2								

SUBSTITUTES

One pound of flour daily may be substituted for the daily ration of biscuit or fresh bread; two ounces of desiccated vegetables for one pound of potatoes or yams; six ounces of hominy, oatmeal, or cracked wheat, or two ounces of tapioca, for six ounces of rice; six ounces of canned vegetables for one-half pound of canned tomatoes; one-eighth of an ounce of tea for three-fourths of an ounce of coffee; three-fourths of an ounce of coffee for one-eighth of an ounce of tea; six ounces of canned fruit for three ounces of dried fruit; one-half ounce of lime juice for the daily ration of vinegar; four ounces of oatmeal or cracked wheat for one-half pint of corn meal; two ounces of pickled onions for four ounces of fresh onions.

When the vessel is in port and it is possible to obtain the same, one and one-half pounds of fresh meat shall be substituted for the daily rations of salt and canned meat; one-half pound of green cabbage for one ration of canned tomatoes; one-half pound of fresh fruit for one ration of dried fruit. Fresh fruit and vegetables shall be served while in port if obtainable. The seamen shall have the option of accepting the fare the Master may provide, but the right at any time to demand the foregoing scale of provisions.

The foregoing scale of provisions shall be inserted in every article of agreement, and shall not be reduced by any contract, except as above, and a copy of the same shall be posted in a conspicuous place in the galley and in the fore-castle of each vessel.

And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service to be duly performed the said Master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the foregoing scale. And it is hereby agreed, that any embezzlement or willful or negligent destruction of any part of the vessel's cargo or stores shall be made good to the owner out of the wages of the person guilty of the same. And if any person enters himself as qualified for a duty which he proves himself incompetent to perform, his wages shall be reduced in proportion to his incompetency. And it is also agreed that if any member of the crew considers himself to be aggrieved by any breach of the agreement or otherwise, he shall represent the same to the Master or officer in charge of the ship in a quiet and orderly manner, who shall thereupon take such steps as the case may require.

exceeding NINE (9) calendar months.

GOING ON SHORE IN FOREIGN PORTS IS PROHIBITED EXCEPT BY PERMISSION OF THE MASTER  
NO DANGEROUS WEAPONS OR Grog ALLOWED, AND NONE TO BE BROUGHT ON BOARD BY THE CREW

SCALE OF PROVISIONS to be allowed and served out to the Crew during the voyage in addition to the daily issue of lime and lemon juice and sugar, or other antiscorbutics in any case required by law

	Sun-day	Mon-day	Tues-day	Wednes-day	Thurs-day	Fri-day	Satur-day		Sun-day	Mon-day	Tues-day	Wednes-day	Thurs-day	Fri-day	Satur-day
Water.....	quarts 5	5	5	5	5	5	5	Coffee (green berry).....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Biscuit.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Tea.....	ounce 3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2
Beef, salt.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Sugar.....	ounce 3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2
Pork, salt.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Molasses.....	pint 3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2
Flour.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Dried fruit.....	ounce 3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2	3 1/2
Canned meat.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Pickles.....	pint 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Fresh bread.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Vinegar.....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Fish, dry, preserved, or fresh.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Corn meal.....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Potatoes or yams.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Lard.....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Canned tomatoes.....	pound 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Butter.....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Peanut butter.....	pint 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	Mustard, pepper, and salt sufficient for seasoning.....	ounce 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Beans.....	pint 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2								
Rice.....	pint 1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2								

SUBSTITUTES

One pound of flour daily may be substituted for the daily ration of biscuit or fresh bread; two ounces of desiccated vegetables for one pound of potatoes or yams; six ounces of hominy, oatmeal, or cracked wheat, or two ounces of tapioca, for six ounces of rice; six ounces of canned vegetables for one-half pound of canned tomatoes; one-eighth of an ounce of tea for three-fourths of an ounce of coffee; three-fourths of an ounce of coffee for one-eighth of an ounce of tea; six ounces of canned fruit for three ounces of dried fruit; one-half ounce of lime juice for the daily ration of vinegar; four ounces of oatmeal or cracked wheat for one-half pint of corn meal; two ounces of pickled onions for four ounces of fresh onions.

When the vessel is in port and it is possible to obtain the same, one and one-half pounds of fresh meat shall be substituted for the daily rations of salt and canned meat; one-half pound of green cabbage for one ration of canned tomatoes; one-half pound of fresh fruit for one ration of dried fruit. Fresh fruit and vegetables shall be served while in port if obtainable. The seamen shall have the option of accepting the fare the Master may provide, but the right at any time to demand the foregoing scale of provisions.

The foregoing scale of provisions shall be inserted in every article of agreement, and shall not be reduced by any contract, except as above, and a copy of the same shall be posted in a conspicuous place in the galley and in the fore-castle of each vessel.

And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service to be duly performed the said Master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the foregoing scale. And it is hereby agreed, that any embezzlement or willful or negligent destruction of any part of the vessel's cargo or stores shall be made good to the owner out of the wages of the person guilty of the same. And if any person enters himself as qualified for a duty which he proves himself incompetent to perform, his wages shall be reduced in proportion to his incompetency. And it is also agreed that if any member of the crew considers himself to be aggrieved by any breach of the agreement or otherwise, he shall represent the same to the Master or officer in charge of the ship in a quiet and orderly manner, who shall thereupon take such steps as the case may require.

It is also agreed that

IN WITNESS WHEREOF the said parties have subscribed their names hereto on the days against their respective signatures mentioned.

Thomas C. Price

Master, of 345 Lawrence St. Minneapolis, Minn.

on the 8th day of June, 1943

The authority of the owner or agent for the allotments mentioned in these articles is in my possession.

Deputy

Rudolph Grady  
Shipping Commissioner or Consular Officer.

The Shipping Commissioner or Consular Officer will sign if such authority has been produced and will strike out in ink if it has not

1 Here the voyage is to be described, and the place named at which the ship is to touch, or, if that cannot be done, the general nature and probable length of the voyage is to be stated, and the port or country at which the voyage is to terminate.  
2 If these words are not necessary they must be stricken out.

3 Sec. 4008, R. S., prohibits the wearing of sheath knives on shipboard, and the Master informs the crew of this law.  
4 Here any other stipulations may be inserted to which the parties agree, and which are not contrary to law.

N. B.—This form must not be unstitched. No leaves may be taken out of it, and none added or substituted. Care should be taken at the time of engagement that a sufficiently large form is used. If more men are engaged during the voyage than the number for whom signatures are provided in this form, an additional form should be obtained and used.

Any Erasure, Interlineation, or Alteration in this Agreement will be void, unless attested by a Shipping Commissioner, Consul General, Consul, or Consular Agent, to be made with the consent of the persons interested.



# CERTIFICATES

## Or Endorsements Made by Shipping Commissioners and Consuls

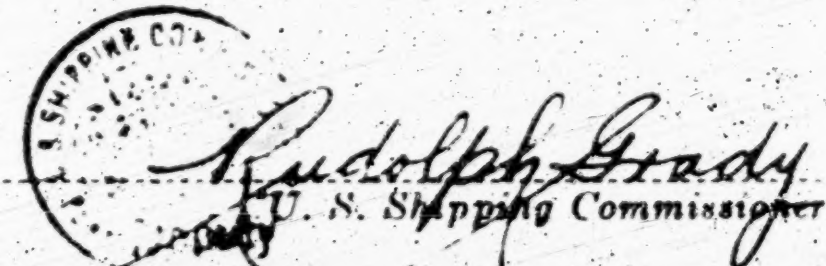
I HEREBY CERTIFY that the entries in the Discharge Books of seamen included in these articles agree with the applicable entries herein, or Certificates of Discharge have been issued in accordance therewith.

U. S. Shipping Commissioner.

### CITIZENSHIP REQUIREMENTS (crew exclusive of licensed officers)

	SUBSIDIZED PASSENGER VESSELS	SUBSIDIZED CARGO VESSELS	NONSUBSIDIZED VESSELS
	90 percent shall be citizens of United States, either native-born or naturalized. Legally admitted aliens may comprise other 10 percent but may be employed in Steward's Department only.	On and after Sept. 27, 1936, 100 percent citizens of United States, either native-born or naturalized.	On and after Dec. 25, 1936, 75 percent citizens of United States, either native-born or naturalized.
	Number	Number	Number
Native-born citizens			28
Naturalized citizens			1
First papers U. S. A. - ?			5
Admissible aliens			
Percentage (American citizens)	%	%	85 %

I HEREBY CERTIFY that the above statement as to the citizenship of the crew signed on these articles is true and correct.

  
 U. S. Shipping Commissioner.

### ATTENTION OF MASTERS ESPECIALLY INVITED TO THE FOLLOWING REQUIREMENTS OF LAW

#### Agreement To Ship in Foreign Trade.

(R. S. 4511—46 U. S. C. 564) The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or the Republic of Mexico, or of any vessel of the burden of seventy-five tons, or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing, or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned:

(R. S. 4519—46 U. S. C. 577) The master shall, at the commencement of every voyage or engagement, cause a legible copy of the agreement, omitting signatures, to be placed or posted up in such part of the vessel as to be accessible to the crew, and on default shall be liable to a penalty of not more than \$100.

#### Penalty for Shipping Without Agreement.

(R. S. 4514—46 U. S. C. 567) If any person shall be carried to sea as one of the crew on board of any vessel making a voyage as hereinbefore specified (R. S. 4511) without entering into an agreement with the master of such vessel, in the form and manner, and at the place and times in such cases required, the vessel shall be held liable for each such offense to a penalty of not more than \$200. But the vessel shall not be held liable for any person carried to sea, who shall have secretly stowed away himself without the knowledge of the master, mate, or of any of the officers of the vessel, or who shall have falsely personated himself to the master, mate, or officers of the vessel, for the purpose of being carried to sea.

#### Shipment in Foreign Ports Before Consular Approval.

(R. S. 4517—46 U. S. C. 570) Every master of a merchant vessel who engages any seaman at a place out of the United States, in which there is a consular officer, shall, before carrying such seaman to sea, procure the sanction of such officer and shall engage seamen in his presence; and the rules governing the engagement of seamen before a shipping commissioner in the United States shall apply to such engagements made before a consular officer, and upon every such engagement the consular officer shall endorse upon the agreement his sanction thereof, and an attestation to the effect that the same has been signed in his presence and otherwise duly made.

(R. S. 4518—46 U. S. C. 571) Every master who engages any seaman in any place in which there is a consular officer otherwise than as required by the preceding section shall incur a penalty of not more than \$100, for which penalty the vessel shall be held liable.

#### Shipment of Seamen in the Coasting or Nearby Foreign Trade.

(June 19, 1886—Sec. 2—46 U. S. C. 646) Shipping commissioners may ship and discharge crews for any vessel engaged in the coastwise trade, or the trade between the United States and the Dominion of Canada, or Newfoundland, or the West Indies, or the Republic of Mexico, at the request of the master or owner of such vessel.

#### Watches—Hours of Labor—Legal Holidays.

(R. S. 4551—Sec. 2—46 U. S. C., Supp. IV 673) In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, lakes (other than Great Lakes), bays, sounds, bayous, and canals, exclusively, the licensed officers and sailors, coal passers, firemen, oilers, and water tenders shall, while at sea, be divided into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. No licensed officer or seaman in the deck or engine department of any tug documented under the laws of the United States (except boats or vessels used exclusively for fishing purposes) navigating the Great Lakes, harbors of the Great Lakes, and connecting and tributary waters between Gary, Ind.; Duluth, Minn.; Niagara Falls, N. Y.; and Ogdensburg, N. Y., shall be required or permitted to work more than eight hours in one day except in case of extraordinary emergency affecting the safety of the vessel and/or life or property. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor

FOREIGN	NEARBY	COASTWISE
41	Shipped.	
0	Reshipped.	
41	Total.	
0	Failed to join.	

	DECK	ENGINE	STEWARDS	TOTAL
Officers				
United States (native)	3	4		7
United States (naturalized)				
Men				
United States (native)	11	8	19	38
United States (naturalized)	1			1
Austrian				
British				
Chinese				
Danish				
Dutch				
Filipino				
French				
German				
Italian				
Norwegian				
Portuguese				
Russian				
Spanish				
Swedish				
Central American				
South American				
Others U. S. A. - ?	1	2	2	5
TOTAL	16	14	11	41

and each seaman, respectively, in the presence of the shipping commissioner, shall sign a mutual release of all claims for wages in respect of the past voyage or engagement, and the shipping commissioner shall also sign and attest it, and shall retain it in a book to be kept for that purpose, provided both the master and seaman assent to such settlement, or the settlement has been adjusted by the shipping commissioner.

(R. S. 4534—46 U. S. C. 597) A seaman's right to wages and provisions shall be taken to commence either at the time at which he commences work, or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens.

(R. S. 4530—46 U. S. C. 597) Every seaman on a vessel of the United States shall be entitled to receive, on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 4529 of the Revised Statutes: *Provided further*, That notwithstanding any release signed by any seaman under section 4552 of the Revised Statutes, any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require.

#### Discharge in Foreign Trade.

(R. S. 4549—46 U. S. C. 641) All seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port, or, being of the burden of seventy-five tons or upward, from a port on the Atlantic to a port on the Pacific, or vice versa, shall be discharged and receive their wages in the presence of a duly authorized shipping commissioner under this Title (R. S. 4501—4612), except in cases where some competent court otherwise directs; and any master or owner of any such vessel who discharges any such seaman belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than \$50.

(R. S. 4551—Subsec. (d)—46 U. S. C., Supp. IV 643 (d)) Upon the discharge of any seaman and the payment of his wages, the shipping commissioner shall enter in the continuous discharge book of such seaman, if the seaman carries such a book, the name and official number of the vessel, the nature of the voyage (foreign, intercoastal, or coastwise), the class to which the vessel belongs (steam, motor, sail, or barge), the date and place of the shipment and of the discharge of such seaman, the rating (capacity in which employed) then held by such seaman, and the signature of the person making such entries and nothing more.

(R. S. 4551—Subsec. (c)—46 U. S. C., Supp. IV 643 (c)) For the purpose of furnishing evidence of sea service in the case of seamen preferring the certificate of identification instead of the continuous discharge book, the Bureau of Marine Inspection and Navigation shall provide a certificate of discharge, printed on durable paper, in such form as to specify the name and citizenship of the seaman to whom it is issued, the serial number of his certificate of identification, the name and official number of the vessel, the nature of the voyage (foreign, intercoastal, or coastwise), the class to which the vessel belongs (steam, motor, sail, or barge), the date and place of the shipment and of the discharge of such seaman, and the rating (capacity in which employed) then held by such seaman. Records of service entered in either continuous discharge books or certificates of discharge shall contain no reference to the character or ability of the seaman. The shipping commissioner shall issue such certificate of discharge and make the proper entries therein, which certificate shall be signed by the seaman to whom it is issued and the master of the vessel and shall be witnessed by such shipping commissioner.

(R. S. 4551—Subsec. (k)—46 U. S. C., Supp. IV 643 (k)) Where vessels are required to sign on and discharge the crew before a shipping commissioner and no shipping commissioner is appointed or is available the functions and duties required by subsections (d) and (e) of this section to be performed by such shipping commissioner may be performed by a collector or deputy collector of customs: and where vessels are not required to sign on and discharge

2266



I HEREBY CERTIFY that the above statement as to the citizenship of the crew, signed on these articles is true and correct.

*Rudolph Grady*  
U. S. Shipping Commissioner

Spanish				
Swedish				
Central American				
South American				
Others U. S. A.	1	2	2	5
TOTAL	14	14	11	41

## ATTENTION OF MASTERS ESPECIALLY INVITED TO THE FOLLOWING REQUIREMENTS OF LAW

### Agreement To Ship in Foreign Trade.

(R. S. 4511—46 U. S. C. 564) The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or the Republic of Mexico, or of any vessel of the burden of seventy-five tons, or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing, or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned:

(R. S. 4519—46 U. S. C. 577) The master shall, at the commencement of every voyage or engagement, cause a legible copy of the agreement, omitting signatures, to be placed or posted up in such part of the vessel as to be accessible to the crew, and on default shall be liable to a penalty of not more than \$100.

### Penalty for Shipping Without Agreement

(R. S. 4514—46 U. S. C. 567) If any person shall be carried to sea, as one of the crew on board of any vessel making a voyage as hereinbefore specified (R. S. 4511) without entering into an agreement with the master of such vessel, in the form and manner, and at the place and times in such cases required, the vessel shall be held liable for each such offense to a penalty of not more than \$200. But the vessel shall not be held liable for any person carried to sea, who shall have secretly stowed away himself without the knowledge of the master, mate, or of any of the officers of the vessel, or who shall have falsely personated himself to the master, mate, or officers of the vessel, for the purpose of being carried to sea.

### Shipment in Foreign Ports Before Consular

(R. S. 4517—46 U. S. C. 570) Every master of a merchant vessel who engages any seaman at a place out of the United States, in which there is a consular officer, shall, before carrying such seaman to sea, procure the sanction of such officer and shall engage seamen in his presence; and the rules governing the engagement of seamen before a shipping commissioner in the United States shall apply to such engagements made before a consular officer, and upon every such engagement the consular officer shall endorse upon the agreement his sanction thereof, and an attestation to the effect that the same has been signed in his presence and otherwise duly made.

(R. S. 4518—46 U. S. C. 571) Every master who engages any seaman in any place in which there is a consular officer otherwise than as required by the preceding section shall incur a penalty of not more than \$100, for which penalty the vessel shall be held liable.

### Shipment of Seamen in the Coasting or Nearby Foreign Trade.

(June 19, 1886—Sec. 2—46 U. S. C. 646) Shipping commissioners may ship and discharge crews for any vessel engaged in the coastwise trade, or the trade between the United States and the Dominion of Canada, or Newfoundland, or the West Indies, or the Republic of Mexico, at the request of the master or owner of such vessel.

### Watches—Hours of Labor—Legal Holidays.

(R. S. 4551—Sec. 2—46 U. S. C. Supp. IV 673) In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, lakes (other than Great Lakes), bays, sounds, bayous, and canals, exclusively, the licensed officers and sailors, coal passers, firemen, oilers, and water tenders shall, while at sea, be divided into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. No licensed officer or seaman in the deck or engine department of any tug documented under the laws of the United States (except boats or vessels used exclusively for fishing purposes) navigating the Great Lakes, harbors of the Great Lakes, and connecting and tributary waters between Gary, Ind.; Duluth, Minn.; Niagara Falls, N. Y.; and Ogdenburg, N. Y., shall be required or permitted to work more than eight hours in one day except in case of extraordinary emergency affecting the safety of the vessel and/or life or property. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; nor shall any licensed officer or seaman in the deck or engine department be required to work more than eight hours in one day; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when in the judgment of the master or other officer the whole or any part of the crew are needed for maneuvering, shifting berth, mooring, or unmooring, the vessel or the performance of work necessary for the safety of the vessel, her passengers, crew, and cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea, from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, or other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, eight hours, inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section and the regulation issued thereunder, the owner shall be liable to a penalty not to exceed \$500, and the seamen shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to vessels engaged in salvage operations: *Provided*, That in all tugs and barges subject to this section when engaged on a voyage of less than six hundred miles, the licensed officers and members of crews other than coal passers, firemen, oilers, and water tenders may, while at sea, be divided into not less than two watches, but nothing in this proviso shall be construed as repealing any part of section 222 of this title. This section shall take effect six months after June 25, 1936. (As amended June 25, 1936, c. 818, 2, 49 Stat. 1933; June 23, 1938; c. 597, 52 Stat. 944.)

### Wages.

(R. S. 4552—46 U. S. C. 644) The following rules shall be observed with respect to the settlement of wages:

First. Upon the completion, before a shipping commissioner, of any discharge and settlement, the master or owner

and each seaman, respectively, in the presence of the shipping commissioner, shall sign a mutual release of all claims for wages in respect of the past voyage or engagement, and the shipping commissioner shall also sign and attest it, and shall retain it in a book to be kept for that purpose, provided both the master and seaman assent to such settlement; or the settlement has been adjusted by the shipping commissioner.

(R. S. 4554—46 U. S. C. 651) A seaman's right to wages and provisions shall be taken to commence either at the time at which he commences work, or at the time specified in the agreement for his commencement of work or the presence on board, whichever first happens.

(R. S. 4530—46 U. S. C. 597) Every seaman on a vessel of the United States shall be entitled to receive, on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining at the time when such demand is made at every port where such vessel after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 4529 of the Revised Statutes: *Provided further*, That notwithstanding any release signed by any seaman under section 4552 of the Revised Statutes, any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require.

### Discharge in Foreign Trade.

(R. S. 4549—46 U. S. C. 641) All seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port, or, being of the burden of seventy-five tons or upward, from a port on the Atlantic to a port on the Pacific, or vice versa, shall be discharged and receive their wages in the presence of a duly authorized shipping commissioner under this Title (R. S. 4501—4612), except in cases where some competent court otherwise directs; and any master or owner of any such vessel who discharges any such seaman belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than \$50.

(R. S. 4551—Subsec. (d)—46 U. S. C., Supp. IV 643 (d)) Upon the discharge of any seaman and the payment of his wages, the shipping commissioner shall enter in the continuous discharge book of such seaman, if the seaman carries such a book, the name and official number of the vessel, the nature of the voyage (foreign, intercoastal, or coastwise), the class to which the vessel belongs (steam, motor, sail, or barge), the date and place of the shipment and of the discharge of such seaman, the rating (capacity in which employed) then held by such seaman, and the signature of the person making such entries and nothing more.

(R. S. 4551—Subsec. (c)—46 U. S. C., Supp. IV 643 (c)) For the purpose of furnishing evidence of sea service in the case of seamen preferring the certificate of identification instead of the continuous discharge book, the Bureau of Marine Inspection and Navigation shall provide a certificate of discharge, printed on durable paper, in such form as to specify the name and citizenship of the seaman to whom it is issued, the serial number of his certificate of identification, the name and official number of the vessel, the nature of the voyage (foreign, intercoastal, or coastwise), the class to which the vessel belongs (steam, motor, sail, or barge), the date and place of the shipment and of the discharge of such seaman, and the rating (capacity in which employed) then held by such seaman. Records of service entered in either continuous discharge books or certificates of discharge shall contain no reference to the character or ability of the seaman. The shipping commissioner shall issue such certificate of discharge and make the proper entries therein, which certificate shall be signed by the seaman to whom it is issued and the master of the vessel and shall be witnessed by such shipping commissioner.

(R. S. 4551—Subsec. (k)—46 U. S. C., Supp. IV 643 (k)) Where vessels are required to sign on and discharge the crew before a shipping commissioner and no shipping commissioner is appointed or is available the functions and duties required by subsections (d) and (e) of this section to be performed by such shipping commissioner may be performed by a collector or deputy collector of customs; and where vessels are not required to sign on and discharge the crew before a shipping commissioner the duties and functions required by subsections (d) and (e) of this section to be performed by the shipping commissioner shall be performed by the master of such vessel. Any master who shall fail to perform such duties or functions shall be fined in the sum of \$50 for each offense.

### Discharge in Foreign Ports.

(R. S. 4580—46 U. S. C. 682) Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge, if it appears to such officer that said seaman has completed his shipping agreement or is entitled to his discharge under any act of Congress or according to the general principles or usages of maritime law as recognized in the United States, such officer shall discharge said seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman; but no payment of extra wages shall be required by any consular officer upon such discharge of any seaman except as provided in this act.

### Arbitration Before Shipping Commissioner.

(R. S. 4554—46 U. S. C. 651) Every shipping commissioner shall hear and decide any question whatsoever between a master, consignee, agent, or owner, and any of his crew, which both parties agree in writing to submit to him; and every award so made by him shall be binding on both parties, and shall, in any legal proceedings which may be taken in the matter, before any court of justice, be deemed to be conclusive as to the rights of the parties. And any document under the hand and official seal of a commissioner purporting to be such submission or award shall be prima facie evidence thereof.



OR NEXT OF KIN	CONDUCT AND QUALIFI- CATIONS	SHIPPING COMMIS- SIONER'S SIGNA- TURE OR INITIALS	PLACE, DAY LEAVING SE
Rev (Bro)			
Westgate and Ave		RB	
Ore Ave		RB	
Ore		RB	
Ore, Calif Linsley (Son) St.		RB	
Ore (Da)		RB	
Ore		RB	
Ore St.		RB	
Ore		RB	
Ore, Calif gden St.		RB	
Ore Michigan Ave		RB	
Ore hook (Mo)		RB	
Locke, Ore sumpter (Mo) well Blvd. th		RB	
Lore St.		RB	
Ore, Calif Ave		RB	
Ore, Calif		RB	
Ore, Calif		RB	

ADDRESS OF WIFE OR NEXT OF KIN	CONDUCT AND QUALIFICATIONS	SHIPPING COMMISSIONER'S SIGNATURE OR INITIALS	PLACE, DAY LEAVING SE
			Place
Walter B. Baker (Bro.)			
Atlanta, Georgia		RB	
2110 S.E. 32nd Ave.			
Portland, Ore		RB	
41 Bill Strauss			
Star St			
Wesley, Ore		RB	
311 Fulton St			
San Francisco, Calif		RB	
Wesley S. Holmsey (Son)			
1004 E. 65th St.		RB	
Chicago, Ill			
Cliff H. Johnson (Fa)		RB	
1216 28th St.			
Milwaukee, Ore		RB	
451 Iowa Ave			
Grino, Calif		RB	
6110 N. E. Floyd St.			
Portland, Ore		RB	
739 5th Ave			
San Francisco, Calif		RB	
4700 S.E. Ogden St.			
Portland, Ore		RB	
417 N. Michigan Ave			
Portland, Ore		RB	
Ethel G. Shook (Mo)			
Star St		RB	
Canby, Ore			
Mr. D. D. Brumley (Mo)		RB	
2257 Roosevelt Blvd.			
Eugene, Ore		RB	
Minor Child			
754 Divisadero St.		RB	
San Francisco, Calif			
954 Laguna Ave			
Burlingame, Calif		RB	
550 Eddy St			
San Francisco, Calif			



W.R. SHIPPING ADMINISTRATION  
99 JOHN STREET  
NEW YORK 7 N. Y.  
SEPTEMBER 10, 1943

U. S. COAST GUARD  
SHIPPING COMMISSIONER  
RECEIVED  
SEP 15 1943

PORTLAND, OREGON

United States Coast Guard  
925 Failing Building  
Portland 4, Oregon

Att: Harold C. Jones  
U.S. Shipping Commissioner

Dear Sirs:

SS GEORGE DAVIDSON

undated

Receipt is acknowledged of your letter ~~xxxxx~~  
enclosing Certificates of Beneficiaries with respect to the above  
named vessel.

Very truly yours

E. A. Bloomquist  
Chief Adjuster  
Division of Wartime Insurance

FAH/aw

By: F. A. Hubbard  
(Miss) F. A. Hubbard aw

W.R. SHIPPING ADMINISTRATION  
99 JOHN STREET  
NEW YORK 7, N. Y.  
SEPTEMBER 10, 1943

U. S. COAST GUARD  
SHIPPING COMMISSIONER  
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Dear Sirs:

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Receipt is acknowledged of your letter ~~dated~~  
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Very truly yours

E. A. Bloomquist  
Chief Adjuster  
Division of Wartime Insurance

By: F. A. Hubbard  
(Miss) F. A. Hubbard

FAH/aw

ATTES-  
TATION  
OF SHIP-  
PING  
COMMISS-  
SIONER

REFERENCE No.

1

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17



No. 154-956  
Dft. Exb. 241  
Treas. Lodge  
Sachs Clerk

DEFENDANT'S EXHIBIT "K"

8725

UNITED STATES OF AMERICA  
WAR SHIPPING ADMINISTRATION  
SHEPARD STEAMSHIP CO., GENERAL AGENTS

No. \_\_\_\_\_

Resident Alien \_\_\_\_\_  
Non-Resident Alien \_\_\_\_\_  
W-4 Status \_\_\_\_\_

SEAMAN'S WAGE ACCOUNT

S/R \_\_\_\_\_ Voy. \_\_\_\_\_ Port \_\_\_\_\_ Date \_\_\_\_\_  
Name \_\_\_\_\_ Rating \_\_\_\_\_ Social Security No. \_\_\_\_\_  
Last Middle First  
Address \_\_\_\_\_  
Street No. \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_

EARNINGS:

	Date	Date	Mos.	Days	Rate	TOTAL
1. WAGES	From	To	@		Per Mo.	
	"	"	"		"	
2. WAR BONUS	"	"	"		"	
	"	"	"		"	
	"	"	"		"	
3. AREA BONUS	"	"	"		Per Day	
	"	"	"		"	
4. PENALTY CARGO AND/OR EXPLOSIVE BONUS	"	"	"		"	
	"	"	"		"	
5. PORT ATTACK BONUS	Date	Date				
	Port	Port	\$	\$		
6. OVERTIME	Hours @	per Hr.		Sec. Watches \$		
7. MEAL ALLOWANCE ASPORT	days @ \$			per day \$		



Vancouver, Washington  
June 8, 1943

It is agreed that the Master, Officers and Members of the Crew shall be furnished the war risk insurance protection covering Loss of Life, Disability (including Dismemberment and Loss of Function), Detention (including Repatriation and similar cases), and Loss of or Damage to Personal Effects prescribed by the Decisions of the Maritime War Emergency Board, as amended or modified from time to time, and the marine risk insurance protection covering such items afforded by the Second Seamen's War Risk Policy, as amended. Such personnel shall also receive the war bonuses specified by the Decisions of the Maritime War Emergency Board, as amended or modified from time to time.

Attested:

Kendolph Grady  
Deputy U. S. Shipping Commissioner

Thomas C. Price  
Master



[fol. 286]

## DEFENDANT'S EXHIBIT "L"

d. Wartimepandi Agreement of December 1, 1942 (Parts I and II and Addenda No. 1 and No. 2) <sup>1</sup>

## Wartimepandi Agreement

## Part I

This agreement, consisting of Parts I and II, made as of the 1st day of December, 1942, by and between the United States of America, acting by and through the Administrator, War Shipping Administration, herein referred to as the "United States", and American Steamship Owners Mutual Protection and Indemnity Association, Inc., herein referred to as "American Association", Fireman's Fund Insurance Company, herein referred to as "Fireman's Fund", and The American Insurance Company, American Eagle Fire Insurance Company, The Continental Insur-

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<sup>1</sup> The Wartimepandi Agreement December 1, 1942 as amended by Addendum No. 1 (see page 793) and Addedum No. 2 (see page 796) is an agreement between the Administrator WSA and commercial marine underwriters pursuant to which they provide marine protection and idemnity insurance on vessels owned by or bareboat chartered to the War Shipping Administration, subject to a limited profit arrangement. In addition to the insurance provided by the Agreement, the Administration has the benefit of underwriters' services in the settlement of claims against the Administration arising out of the operation of these vessels. Such services are in connection with seamen's claims for loss of life or per-onal injury, carrier's liability to cargo, damage to shore structures, and other liabilities insured under the policy. The services obtained from underwriters enables the WSA to avail itself of the underwriters' manpower, eliminates the duplication of such services by the Administration and preserves the American marine protection and indemnity insurance market and its related activities for the post-war period.

This Agreement was for the period December 1, 1942, to December 1, 1943. Certain of the provisions have been the subject of clarifying and modifying letters.



754 Divisadero St.  
San Francisco, Calif.  
954 Laguna Ave  
Berkeley, Calif.  
550 Eddy St  
San Francisco, Calif.



JESSIE M. PRICE (WIFE)  
345 FLORENCE ST.  
MAMA RINECK, N.Y.



283



6. OVERTIME \_\_\_\_\_ Hours @ \_\_\_\_\_ per Hr. \_\_\_\_\_ Sec. Watches \$ \_\_\_\_\_  
7. MEAL ALLOWANCE \_\_\_\_\_ days @ \$ \_\_\_\_\_ per day \$ \_\_\_\_\_  
ASHORE  
8. ROOM ALLOWANCE \_\_\_\_\_ days @ \$ \_\_\_\_\_ per day \$ \_\_\_\_\_  
ASHORE  
9. TOTAL EARNINGS (Lines 1 to 8)


### DEDUCTIONS:

10. WITHHOLDING TAX (Item No. 9 less 7 and 8) \$ \_\_\_\_\_  
Less Exemptions \_\_\_\_\_ Days @ \$ \_\_\_\_\_ @ 20%  
11. SOCIAL SEC. TAX (Items No. 9 less 7 and 8) \$ \_\_\_\_\_  
Plus Board & Log. \_\_\_\_\_ Days @ \$ \_\_\_\_\_ @ %


12. ALLOTMENTS \_\_\_\_\_

13. ADVANCES \_\_\_\_\_

14. SLOPS \_\_\_\_\_

15. FINES \_\_\_\_\_

16. \_\_\_\_\_

17. TOTAL DEDUCTIONS \_\_\_\_\_

18. BALANCE DUE \_\_\_\_\_

I CERTIFY THAT THIS PAYROLL VOUCHER IS TRUE AND CORRECT; THAT THE PERSON NAMED HEREON WAS EMPLOYED AND HAS PERFORMED THE SERVICES FOR THE PERIOD AS STATED ABOVE; AND THAT THE PERSON WHOSE NAME APPEARS ON THIS PAYROLL VOUCHER IS ENTITLED TO THE AMOUNT OF PAY STATED ABOVE.

Received Payment in Full

\_\_\_\_\_  
(Master)  
Paid in full before me in accordance with the above

\_\_\_\_\_  
(Payee)  
Certified as Correct

\_\_\_\_\_  
U.S.C.  
FORM 35 SH SETS-1-44

\_\_\_\_\_  
(Port Purser)



ance Company, Fidelity-Phenix Fire Insurance Company of New York, Firemen's Insurance Company of Newark, New Jersey, Glens Falls Insurance Company, and The Hanover Fire Insurance Company, herein referred to as "Marine Office Group", and Agricultural Insurance Company, The Automobile Insurance Company of Hartford, Connecticut, The Home Insurance Company, New York, United States Fire Insurance Company, and Westchester Fire Insurance Company, herein referred to as "Fulton Group",

Witnesseth:

The parties hereto mutually agree as follows:

### I

The American Association, Fireman's Fund, Marine Office Group, and Fulton Group are each herein referred to as "Underwriter", and are collectively referred to as "Underwriters".

### II

The Underwriters agree to provide protection and indemnity insurance to the United States, its General Agents and Agents under Service Agreements, Berth Agents and Sub-Agents acting on their behalf and Owners, herein referred to collectively as the Assured, in respect of all iron and steel ocean-going vessels of more than 1000 gross registered tons, and any other vessels mutually agreed upon, owned by or bareboat chartered to the United States of America, acting by and through the Administrator, War Shipping Administration, hereinafter referred to as the "insured vessels", and the United States agrees to insure [fol. 287] all such vessels with the Underwriters, against the risks and on the terms and conditions set forth herein and in the policies of insurance to be issued, herein referred to as the "insured risks", which policies, modified to provide any rates, terms and conditions specially agreed upon, shall generally conform to the form of policy attached hereto, marked Part II.

### III

The Underwriters shall each execute and deliver to the United States, a policy of insurance in compliance with the provisions of Article II hereof, and thereafter, upon application by the War Shipping Administration, or any Gen-

eral Agent thereof, the Underwriter to which such application is made shall issue in duplicate a certificate of insurance, generally in the form attached to the policy, by which the insurance provided by the policy, subject to the terms and conditions of this agreement, shall be extended to cover the Assured in respect of all vessels named in the application.

In the event that through error application for insurance pursuant hereto has not been made to any Underwriter, then all who would have been covered had such application been made shall be held covered by the Underwriter to which notice of the error is given, provided that application is made promptly after the omission is known to the War Shipping Administration.

Upon the transfer of an insured vessel to another General Agent, the certificate of insurance then outstanding shall be surrendered to the issuing Underwriter, and a new certificate shall be issued by the Underwriter to which a new application is made.

#### IV

The liability of an Underwriter in respect of any one accident or occurrence shall not, unless otherwise agreed, exceed an amount which shall be the equivalent of:

(a) \$175 per gross registered ton in respect of any dry cargo or tank vessel completed prior to January 1, 1938;

(b) \$250 per gross registered ton in respect of any other vessel including fully refrigerated vessels and seatrains;

*Provided, however,* That unless otherwise agreed, the liability of an Underwriter shall in no event exceed \$2,000,000 in respect of any one accident or occurrence in connection with any one vessel.

#### V

The insurance to be made pursuant hereto shall, unless otherwise agreed, attach at and from the 1st day of December, 1942, at 12.01 a. m. Eastern War Time, and shall terminate on the 1st day of December, 1943 at 12.01 a. m. Eastern War Time; provided, however, that, unless otherwise agreed, insurance shall not attach in respect of any vessel during any period she is chartered or sub-chartered



on a bareboat basis by the War Shipping Administration to the War Department, Navy Department, or other agency of the Government, or the Government of any Nation Signatory to the United Nations Pact, unless the vessel is manned by the War Shipping Administration.

[fol. 288]

## VI

The United States shall pay, quarterly in advance to the Underwriter making insurance pursuant hereto, an initial annual premium at the rate of 75¢ per gross registered ton for each insured tank vessel, and \$1.50 per gross registered ton for each insured iron and steel ocean going vessel of more than 1000 gross registered tons, in respect of which certificates of insurance have been issued as provided in Article II hereof. The premium for any insurance attaching after December 1, 1942, shall be prorated from the date of attachment to December 1, 1943.

## VII

Premiums paid by the United States in accordance with Article VI hereof shall be subject to readjustments as follows:

A. As soon as practicable after December 1, 1943, but in no event later than June 1, 1944, each Underwriter, with respect to all insurances pursuant hereto, shall make the following computations based on receipts and expenditures:

(a) The total receipts shall comprise the following items:

(i) All premiums paid by the United States, other than pursuant to the readjustment provided for in this article;

(ii) Any amounts refundable or recoverable under the terms of excess of loss reinsurance policies.

(b) The total expenditures shall comprise the following items:

(i) Losses and loss expenses paid in respect of insured risks;

(ii) Reserve for unpaid losses, unreported losses, possible liabilities on uncompleted voyages, and loss expenses. The War Shipping Administration shall have the privilege of reviewing such reserves;

(iii) Allowances for management, supervision and claims service in accordance with the provisions of Article VIII hereof;

(iv) Premiums for excess of loss reinsurances, in accordance with policies or pro-forma policies on terms agreed upon with the War Shipping Administration;

(v) State or municipal taxes, if any, or premiums or underwriting profits;

(vi) Any premiums refunded to the United States other than pursuant to the readjustment provided for in this Article.

B. If the totals for the Underwriters under A (a) above shall exceed the total of the items under A (b) above, 90% of the difference shall be established as a credit in favor of the United States on account of readjustment return premiums, 25% of such amount being debited to each of the Underwriters. If the total for the Underwriters under A (b) above shall exceed the total of the items under A (a) above, 90% of the difference shall be established as a debit against the United States on account of readjustment additional premiums, 25% of such amount being credited to each of the Underwriters.

C. A recomputation may be made by the Underwriters at any time, but not more than 120 days after the previous computation, and on the basis of such recomputation the debit or credit established as aforesaid shall be replaced by a new debit or credit similarly arrived at. In any such recomputation, the new debit or credit shall be reduced by [fol. 289] the amount of any payment of readjustment return premium or readjustment additional premium previously made pursuant to the provisions of Clause D below.

D. Until final liquidation, as hereinafter provided, no payment shall be made to the United States on account of any credit as aforesaid unless the amount of the same exceeds 100% of reserves for unpaid losses as per A (b) (ii) above, and the amount of any such payment shall only be for the excess of such 100%. No payment shall be made to the Underwriters on account of any debit as aforesaid unless the amount of same exceeds 50% of reserves for unpaid losses as per A (b) (ii) above, and the amount of any



such payment shall only be for the excess of such 50%. Payments as aforesaid shall be due and payable within thirty days after such computation.

E. Final accounting and settlement may be made at any time by mutual agreement, and shall, in any event, be made as soon as all known liabilities have been liquidated, at which time the full amount of any credits as aforesaid which has not yet been paid shall be paid to the United States and the full amount of any debit as aforesaid which has not been paid shall be paid to the Underwriters.

F. The War Shipping Administration reserves the right to audit any statement as above, and shall also have the privilege of reviewing the fees, costs, charges and expenses referred to in Paragraph C of Article VIII, but in such audit or review, no item of expense, claims expense, or claims settlement, shall be disallowed if made in accordance with Article X hereof or if made in good faith and pursuant to this agreement.

G. Premiums paid to an Underwriter on insurance written pursuant hereto and reinsurance premiums paid to an Underwriter by another Underwriter in connection with reinsurance between the Underwriters of business written pursuant hereto, shall not be or be regarded or treated as earned until (and then only to the extent that) such premiums or reinsurance premiums are used to pay the items listed in A (b) of this Article, or are finally taken over and appropriated by the Underwriter following a readjustment as provided for in paragraphs B and C of this Article.

## VIII

(a) The Underwriters shall provide competent and adequate management, supervision and claims services;

(b) The allowance for management, supervision and claims service provided or in Article VII A (b) (iii) hereof, shall be  $11\frac{2}{3}$  per gross ton for each insured vessel, prorated in respect of any insurance attaching after December 1, 1942, from the date of attachment to December 1, 1943, and shall cover the following:

(i) Costs of said management, supervision and claims service, except as hereinafter set forth;

(ii) Brokerage at the rate of 2¢ per gross ton of the insured vessels, prorated in respect of any insurance

attaching after December 1, 1942, from the date of attachment to December 1, 1943:

(iii) Investigation and adjustment expenses incurred in the Ports of New York, New Orleans, Los Angeles, San Francisco, and Portland, Oregon, but excluding [fol. 290] expenses of investigation conducted by attorneys at law at said ports, if the claims develop into legal actions;

(c) Expenses not chargeable to the allowance for management, supervision and claims service, but to be included as expenses under Article VII-A (b) (i) hereof, shall be the following:

(i) Doctors, dentists, hospital, x-ray, laboratory charges, drugs, medicines, dressings, nurses, attendants, ambulances, physical therapy, artificial and other orthopedic appliances; also other costs and charges relating to the relief, cure or treatment of injuries and illnesses;

(ii) Attorneys' fees, costs and charges, including legal expenses and court costs incurred in the defense of litigation either pending or contemplated;

(iii) Charges and expenses of correspondents and investigation of claims other than at the ports of New York, New Orleans, Los Angeles, San Francisco and Portland, Oregon;

(iv) Fees and charges of experts, lay or professional, doctors, surveyors, engineers, scientists, chemists, photographers (still and motion picture), model makers, metallurgists, professors, together with costs, expenses and witness fees of lay and other witnesses, etc.;

(d) Any fee for legal services in excess of \$1500 shall be subject to the approval of the War Shipping Administration.

## IX

(a) Any General Agent of the United States insured hereunder shall, unless otherwise agreed, be authorized to settle directly, or approve settlement of, cargo claims up to \$1000 in the aggregate, on any one voyage, and life, injury

or illness claims up to \$250 each, and all other claims up to \$100 each.

(b) An Assured, at any time, may ask for, and the Underwriter shall give advice and assistance in respect of any claim arising from an insured risk, regardless of the amount.

## X

A Loss Committee shall be appointed, comprised of a representative of each Underwriter. A representative of the War Shipping Administration may attend the meetings of the Committee and it shall receive due notice of all such meetings. The Committee shall consider all claims made against the Assured involving amounts in excess of \$10,000, and any claims referred to the Committee by any of the Underwriters or Assured. The recommendations of the Committee shall be advisory to the Underwriter concerned and Assured. The Underwriter issuing a policy shall have full authority to settle all insured claims exclusive of all expenses, up to but not exceeding \$25,000, and such settlements shall be binding upon all the parties hereto. Settlements of any claim in excess of \$25,000, exclusive of all expenses, shall only be made upon approval of the War Shipping Administration. In the event of disclaimer of liability by the Underwriter under any policy issued pursuant to this Agreement nothing in the foregoing shall prejudice the right of the Assured under such policy.

[fol. 291]

## XI

Either the United States, or the Underwriters collectively, may cancel this Agreement as to future attachments by giving thirty days' written notice, and such notice shall constitute a notice of cancellation under any and all policies and outstanding certificates of insurance issued pursuant hereto, in accordance with the terms thereof; in all other respects this agreement shall remain in effect for the adjustment and settlement of rights and liabilities in accordance with the provisions hereof. Cancellation by the "Assurer" under Paragraph 26 (a) of Part II hereof shall not be effective unless collective cancellation notice is also given as provided in the preceding sentence.



## XII

The Underwriters may take out excess of loss reinsurance, and enter into among themselves a participating reinsurance agreement which shall be patent to the War Shipping Administration.

## XIII

The obligations of the Marine Office Group resulting from any assumption of liability hereunder by the Group under the designation of "Underwriter" or "Underwriters", or otherwise, shall be separate and not joint, in the following proportions, to wit:

The American Insurance Company .....	15%
American Eagle Fire Insurance Company : .....	8%
The Continental Insurance Company .....	18%
Fidelity-Phoenix Fire Insurance Company of New York .....	18%
Firemen's Insurance Company of Newark, New Jersey .....	15%
Glens Falls Insurance Company .....	18%
The Hanover Fire Insurance Company .....	8%

The obligations of the Fulton Group resulting from any assumption of liability hereunder by the Group under the designation of "Underwriter" or "Underwriters", or otherwise, shall be separate and not joint, in the following proportions, to wit:

Agricultural Insurance Company .....	12%
The Automobile Insurance Company of Hart- ford, Connecticut .....	20%
The Home Insurance Company, New York .....	20%
United States Fire Insurance Company .....	24%
Westchester Fire Insurance Company .....	24%

The obligations of the American Association and Fireman's Fund hereunder shall be separate and not joint.

The policies of insurance to be issued by the Marine Office Group and Fulton Group, as provided in Article III hereof, shall include appropriate clauses to effectuate the foregoing obligations.



## XIV

(a) Each of the Underwriters warrants that it has not employed any person to solicit or secure this agreement upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the United States the right to annul this agreement or, in its discretion, to deduct from any amount payable hereunder to the Underwriter guilty of such breach the amount of such commission, percentage, brokerage, or contingent fee.

[fol. 291a] (b) In any act performed under this agreement the Underwriters shall not discriminate against any citizen of the United States of America on the ground of race, creed, color or national origin.

## XV

No person elected or appointed a member of or delegate to Congress or a Resident Commissioner, directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account shall hold or enjoy this agreement in whole or in part, except as provided in Section 206, Title 18, U. S. C. None of the Underwriters shall employ any member of Congress, either with or without compensation, as an attorney, agent, officer, or director.

In witness whereof the parties hereto have caused these presents to be executed by their officers thereunto duly authorized the day and year herein first above written.

United States of America, by ———, Administrator, War Shipping Administration. American Steamship Owners Mutual Protection and Indemnity Association, Inc., by ———. Fireman's Fund Insurance Company, by ———.

Marine Office Group:

The American Insurance Company, by ———.  
 American Eagle Fire Insurance Company, by ———.  
 ———. The Continental Insurance Company, by ———.  
 ———. Fidelity-Phenix Fire Insurance Company, of New York, by ———.  
 ———. Fireman's Insurance Company of Newark, New Jersey, by ———.  
 ———. Glens Falls Insurance Company, by ———.  
 ———. The Hanover Fire Insurance Company, by ———.

## Fulton Group:

Agricultural Insurance Company, by ——. The Automobile Insurance Company of Hartford, Connecticut, by ——. The Home Insurance Company, New York, by ——. United States Fire Insurance Company, by ——. Westchester Fire Insurance Company, by ——.

[fol. 292]

## Wartimepandi Agreement

## Part II

## Wartimepandi Policy

— (Herein called the Assurer)

In consideration of the stipulation herein named and of premiums as agreed, does insure and cause to be insured The United States of America, acting by and through the Administrator, War Shipping Administration, and its General Agents and Agents under Service Agreements, Berth Agents and Sub-Agents acting on their behalf and Owners, hereinafter collectively called the Assured, in the maximum amount, in respect of each vessel insured hereunder, of \$175 per gross registered ton of any dry cargo or tank vessel completed prior to January 1, 1938, or \$250 per gross registered ton of any other vessel, including fully refrigerated vessels and seatrains, and not exceeding, in any event, \$2,000,000 in respect of any one accident or occurrence in connection with any one vessel, at and from the First day of December, 1942, at 12:01 A. M., E. W. T., unless otherwise agreed, until the first day of December, 1943, at 12:01 A. M., E. W. T., against the liabilities of the Assured as hereinafter described, and subject to the terms and conditions hereinafter set forth, in respect of vessels for which certificates of insurance are issued as hereinafter provided, which vessels are sometimes herein referred to as "insured vessels" or "vessels insured hereunder."

Loss, if any, to be payable to order of United States of America, represented by the Administrator, War Shipping Administration, except that claims not in excess of \$10,000 each shall be payable to order of the General Agent to whom the covering certificate of insurance is issued, unless the War Shipping Administration by written notice to the Assurer issues instructions to the contrary.

Upon application by the War Shipping Administration, or a General Agent thereof, for insurance hereunder with respect to any iron or steel ocean-going vessel of more than 1000 gross registered tons, of which the United States of America, acting by and through the Administrator, War Shipping Administration, is the owner, or bare boat charterer, a certificate of insurance, generally conforming to the form attached hereto, by which insurance hereunder will be extended to cover the Assured, will be issued in duplicate by the Assurer.

In respect of any vessel constructed for account of the United States of America, represented by the United States Maritime Commission, and the United States of America, represented by the Administrator, War Shipping Administration, and any other vessel of which the United States of America, represented by the Administrator, War Shipping Administration, becomes the owner or bare boat charterer, but which is not delivered to the War Shipping Administration by December 1, 1942, 12:01 A. M., E. W. T., for which an application for insurance hereunder is made, this insurance shall attach, unless otherwise agreed, on either of the following dates, whichever shall first occur: (a) the day that the first member of the crew engaged by or for Assured boards the vessel; or (b) the time when the vessel is delivered to the Assured.

Unless otherwise agreed this insurance shall not attach in respect of any vessel during any period she is chartered or [fol. 293] subchartered on a bare boat basis by the War Shipping Administration to the War Department, Navy Department, or other agency of the Government, or the Government of any Nation Signatory to the United Nations Pact, unless the vessel is manned by the War Shipping Administration.

Premiums hereunder shall be payable by the Assured quarterly in advance as to all vessels covered at the inception date of the policy; prorated to the next quarterly date with respect to coverages made thereafter; and then quarterly.

The assurer agrees to indemnify the assured against any loss, damage or expense which the assured shall become liable to pay and shall pay by reason of the fact that the assured is the owner, or bare boat charterer, or the general agent or agent or berth agent or subagent of the owner or bare boat charterer, (or mortgagee, trustee, or receiver thereof, as the case may be) of the insured vessel and which



shall result from the following liabilities, risks, events, occurrences or expenditures:

*Loss of life, injury, and illness.* (1) Liability for life salvage, loss of life of, or personal injury to, or illness of, any person, not including, however, unless otherwise agreed by endorsement hereon, liability to an employee (other than a seaman) of the assured, or in case of his death to his beneficiaries, under any compensation act, liability hereunder shall also include burial expenses not exceeding \$200, where reasonably incurred by the assured for the burial of any seaman. The term person as aforesaid shall include any person or persons carried on the insured vessel.

(a) Insurance hereunder, shall cover the liability of the Assured for claims under any Compensation Act (other than hereafter excepted), in respect of employees (i) who are members of the crew of the insured vessel, or (ii) who are placed on board the insured vessel with the intention of becoming a member of her crew, or (iii) who, in the event of the vessel being laid up and out of commission, are engaged in the upkeep, maintenance or watching of the insured vessel, or (iv) who are engaged by the insured vessel or its Master to perform stevedoring work in connection with the vessel's cargo at ports in Alaska and ports outside the Continental United States where contract stevedores are not readily available. This insurance, however, shall not be considered as a qualification under any Compensation Act, but, without diminishing in any way the liability of the Assurer under this policy, the Assured may have in effect policies covering such liabilities. All claims under such Compensation Acts for which the Assurer is liable under the terms of this policy are to be paid without regard to such other policies.

(b) Insurance hereunder shall not cover any liability under the provisions of the Act of Congress approved September 7th, 1916 and as amended, Public Act #267, Sixty Fourth Congress, known as the U. S. Employees Compensation Act.

(c) Insurance hereunder in connection with the handling of cargo for the insured vessel shall commence from the time of receipt by the Assured of the cargo on dock or wharf, or on craft alongside for loading, and shall continue until due



delivery thereof from dock or wharf of discharge or until discharge from the insured vessel on to a craft alongside.

(d) Claims hereunder, other than for burial expenses, are subject to a deduction of \$250 with respect to each accident or occurrence, 194—, 12:01 A. M., E. W. T., and expiring December 1, 1943, 12:01 A. M., E. W. T., unless previously cancelled in accordance with the terms of the Policy.

Premium Rate	Total Prem.	Now Due	Due 3/1/43	Due 6/1/43	Due 9/1/43

—, by —

(Detachable Stub at Bottom of Certificate)

In event cancellation is to be made of this certificate the following form should be completed and returned to the Assurer(s) for issuance of cancellation endorsement:

Vessel Name —. Entry No. —. Effective Date of Cancellation —. Reason for Cancellation —. Name New General Agent —. Signature General Agent Requesting Cancellation —.

### Wartimepandi Agreement

#### Addendum No. 1

Addendum to Agreement herein referred to as the Principal Agreement, made as of the 1st day of December, 1942; by and between the United States of America, acting by and through the Administrator, War Shipping Administration, herein referred to as the "United States", and American Steamship Owners Mutual Protection and Indemnity Association, Inc., herein referred to as "American Association", Fireman's Fund Insurance Company, herein referred to as "Fireman's Fund", and The American Insurance Company, American Eagle Fire Insurance Company, The Continental Insurance Company, Fidelity-Phenix Fire Insurance Company of New York, Firemen's Insurance Company of Newark, New Jersey, Glens Falls Insurance Company, and The Hanover Fire Insurance Company, herein referred to as "Marine Office Group", and Agricultural Insurance Company, The Automobile Insurance Company

of Hartford, Connecticut, The Home Insurance Company, New York, United States Fire Insurance Company, and Westchester Fire Insurance Company, herein referred to as "Fulton Group",

Witnesseth: The parties hereto mutually agree that said Principal Agreement, and the policies issued pursuant thereto shall be deemed amended as hereinafter provided:

### I

The words "iron and (or) steel ocean-going vessels of more than 1,000 gross registered tons" appearing in the Principal Agreement and the policies issued pursuant thereto shall be amended to read "iron, steel and concrete ocean-going and Great Lakes vessels (excluding tugs, barges and sailing vessels) of more than 1,000 gross registered tons"; provided, however, that the initial annual premium for each concrete dry cargo vessel insured hereunder shall be at the rate of \$2.15 per gross registered ton, prorated from the date of attachment to December 1, 1943.

### II

The Underwriters, by mutual agreement, may insure under the Principal Agreement any vessel in respect of which the United States has an insurable interest, by endorsement, initialed by the Underwriters, attached to the covering policy, setting forth any terms and conditions which modify the Principal Agreement or policy.

### III

There shall be attached, or deemed to be attached, to each policy issued under the Principal Agreement, an endorsement reading as follows:

"Effective from December 1, 1942, 12:01 A.M. Eastern War Time:

"No liability shall attach to the Assurer(s) for any loss, damage or expense under paragraphs (3) and (7) in respect of lend lease cargo and cargo owned by the United States or any agency or department thereof, including, but not limited to, the War Department, Navy Department, Metal Reserves Company, Rubber Reserves Company, Defense Supplies Corporation and Reconstruction Finance Corporation;



"No liability shall attach to the Assurer(s) under this policy for any loss, damage or expense in respect of claims, recoveries or other matters which are waived, or the defense or settlement of which is assumed (including, but not limited to, claims involving privately owned fixed objects or property) by and under the Agreement made as of December 4, 1942, by and between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland."

In consideration of the foregoing endorsement, Article VI of the Principal Agreement shall be amended to read as follows:

"The United States shall pay, quarterly in advance to the Underwriter making insurance pursuant hereto, an initial annual premium at the rate of 70¢ per gross registered ton for each insured tank vessel, and \$1.40 per gross registered ton for each insured iron and steel ocean-going or Great Lakes vessel of more than 1000 gross registered tons, in respect of which certificates of insurance have been issued as provided in Article II hereof. The premium for any insurance attaching after December 1, 1942, shall be prorated from the date of attachment to December 1, 1943."

#### IV

Article IX of the Principal Agreement shall be amended to read as follows:

"(a) Any General Agent and/or Berth Sub-Agent of the United States insured hereunder, unless otherwise agreed, shall be authorized to settle directly, or approve settlement of, cargo claims up to \$1,000 in the aggregate and in excess thereof up to \$100 in respect of any one cargo claim under [fol. 296] any one bill of lading, but in no event shall the authority hereunder exceed in all \$3,500 on any one voyage, provided, however, that the combined authority to all Agents shall not exceed \$3,500 on any one voyage.

"(b) Any General Agent of the United States insured hereunder, unless otherwise agreed, shall be authorized to settle directly, or approve settlement of

- (i) life, injury or illness claims up to \$250 each and;
- (ii) all other claims up to \$100 each.

"(c) Settlement of claims by Agents under the authority provided in (a) and (b) above shall not be deemed an ad-



mission of the Underwriters' liability under the terms of the policy of insurance issued pursuant to this Agreement.

"(d) An Assured, at any time, may ask for, and the Underwriter shall give advice and assistance in respect of any claim arising from an insured risk, regardless of the amount."

## V

There shall be attached, or deemed to be attached, to each policy issued under the Principal Agreement, an endorsement reading as follows:

"Notwithstanding any thing to the contrary contained in paragraph (20), liability under paragraph (1) shall be extended to cover claims of seamen under any Workmen's Compensation Act whether the liability of the Assured for such claims arises under contract or otherwise."

"Paragraph (5) (b) is hereby amended to read as follows:

"Insurance hereunder shall cover all liabilities for said damages that the insured vessel or her owners would have if she were privately owned by an American citizen regardless of the Assured's right to claim sovereign immunity or immunity to suit, and irrespective of the ownership of any object or property the vessel may damage, whether movable or fixed, provided, however, that the rights of the Assured shall be the same as though the vessel were privately owned."

"Notwithstanding anything to the contrary contained in Paragraph (26) (d), if a newly constructed insured vessel is chartered or sub-chartered on a bareboat basis by the War Shipping Administration to the War Department, Navy Department, or other Agency of the Government, or the Government of any Nation signatory to the United Nations Pact, and not manned by the War Shipping Administration, under circumstances where the said vessel has never been operated or navigated on any ocean voyage, the certificate issued in connection therewith may be surrendered and cancelled, and premium shall be calculated on a prorata basis of 15-day periods (i. e. if such a vessel is on risk for less than 15 days, prorata premiums for 15 days shall be paid; if such a vessel is on risk for more than 15 days but less than 30 days, prorata premiums for two 15-day periods shall be paid, and so on), and returns shall be allowed only on such basis; provided, however, that such

vessel shall not be entitled to lay up returns as provided in Paragraph (25)."

[fol. 297] In Witness Whereof the parties hereto have caused these presents to be executed by their officers thereunto duly authorized this day of — —, 1943.

United States of America, by E. S. Land, Administrator, War Shipping Administration; by — —, Director of Wartime Insurance.

American Steamship Owners Mutual Protection and Indemnity Association, Inc., By — —; Fireman's Fund Insurance Company, by — —.

Marine Office Group: The American Insurance Company, American Eagle Fire Insurance Company, The Continental Insurance Company, Fidelity-Phenix Fire Insurance Company of New York, Firemen's Insurance Company of Newark, New Jersey; Glens Falls Insurance Company, The Hanover Fire Insurance Company, By S. D. McComb, Agent for Marine Office Group; by — —.

Fulton Group: Agricultural Insurance Company, The Automobile Insurance Company of Hartford, Connecticut; The Home Insurance Company, New York; United States Fire Insurance Company, Westchester Fire Insurance Company; By Fulton Shipoperators P. & I. Service, Inc., Agent for Fulton Group; by — —.

#### WARTIMEPANDI AGREEMENT (12/1/42)

##### Addendum No. 2

Addendum to Agreement, herein referred to as the Principal Agreement, made as of the 1st day of December, 1942, by and between the United States of America, acting by and through the Administrator, War Shipping Administration, herein referred to as the "United States", and American Steamship Owners Mutual Protection and Indemnity Association, Inc., herein referred to as "American Association", Fireman's Fund Insurance Company, herein referred to as "Fireman's Fund", and The American Insurance Company, American Eagle Fire Insurance Company, the Continental Insurance Company, Fidelity-Phenix Fire Insurance Company of New York, Firemen's Insurance Company of Newark, New Jersey, Glens Falls Insurance Company, and the Hanover Fire Insurance Company, herein

referred to as "Marine Office Group", and Agricultural [fol. 298] Insurance Company, the Automobile Insurance Company of Hartford, Connecticut, the Home Insurance Company, New York, United States Fire Insurance Company, and Westchester Fire Insurance Company, herein referred to as "Fulton Group",

Witnesseth:

The parties hereto mutually agree that said Principal Agreement and policies issued pursuant thereto shall be amended as hereinafter provided:

## I

New provisions are hereby incorporated in and made a part of subparagraph (b) of Paragraph A of Article VII of the Principal Agreement, effective from its inception, to be designated (vii) and (viii), reading as follows:

"(vii) Losses paid on disputed claims determined to be covered under policies, and loss expenses including costs of defense incurred in respect of disputed claims regardless of whether or not such claims are determined to be covered under this agreement and policies issued pursuant thereto. The term 'disputed claims' shall mean claims for which the Underwriters have denied liability;

"(viii) All losses and expenditures not otherwise included herein mutually agreed upon by the United States and the Underwriters."

## II

A new provision is hereby incorporated in and made a part of Article VII of the Principal Agreement, effective from its inception, to be designated Paragraph H, reading as follows:

"The excess of receipts by all the Underwriters under A (a) above over the total expenditures by all the Underwriters under A (b) above which the Underwriters shall retain under this agreement, in respect of their 10% interests under B above, shall in no event exceed \$300,000.00, and any excess over said amount shall be refunded to the United States on the final accounting under this agreement, 25% of such excess being paid by each Underwriter."



## III

The policies of insurance issued under Part II of the Principal Agreement are hereby amended, effective from their inception, by deleting Clause (d) of Paragraph 27, and incorporating a new paragraph, to be designated Paragraph 28, reading as follows:

“28 (a) Notwithstanding anything to the contrary contained in this policy, the Assurer shall not be liable for or in respect of any loss, damage or expense sustained by reason of capture, seizure, arrest, restraint or detainment or the consequences thereof or of any attempt thereat; or sustained in consequence of military, naval or air action by force of arms, including mines and torpedoes or other missiles or engines of war, whether of enemy or friendly origin; or sustained in consequence of the explosion of ammunition or other [fol. 299] explosive material intended for military use (other than petroleum products) unless the explosion is caused by collision between the vessel named herein and a vessel other than an enemy naval vessel; or sustained in consequence of placing the vessel in jeopardy as an act or measure of war taken in the actual process of a military engagement, including embarking or disembarking troops or material of war in the immediate zone of such engagement; and any such loss, damage and expense shall be excluded from this policy without regard to whether the Assured's liability therefor is based on negligence or otherwise, and whether before or after a declaration of war.

“(b) No liability shall attach to the Assurer for any loss, damage or expense in respect of any claim for loss of life of, or personal injury to, or illness of, or any baggage or personal effects of, any member of the armed forces of the United States on board a military or naval vessel manned by and under the control of military or naval personnel of the United States and arising out of collision with the vessel named herein.”

## IV

A new provision is hereby incorporated in and made a part of the Principal Agreement, effective from its inception, to be designated Article XVI, reading as follows:

"The Administrator, by virtue of the authority vested in him by Section 403 of the 6th Supplemental National Defense Appropriation Act, 1942 (Public, 528, 77 Congress), as amended and acting pursuant to delegation of authority by the War Contracts Price Adjustment Board to the Administrator by instrument dated February 26, 1944, having found that the profits hereunder can now be determined with reasonable certainty and that the provisions of this contract adequately prevent excessive profits, this contract (including the compensation herein provided) is hereby exempted from the provisions of said Section 403, as amended, and of the Renegotiation Act as amended by Section 701 (b) of the Revenue Act of 1943 (Public 235, 78 Congress), pursuant to subsection (i) (2) of said Section 403, as amended, and subsection (i) (4) of the said Renegotiation Act, as amended."

In witness whereof the parties hereto have caused these presents to be executed by their officers and agents thereunto duly authorized as of the 1st day of January 1945.

United States of America, by — —, Administrator War Shipping Administration, by — —, Director of Wartime Insurance.

American Steamship Owners Mutual Protection and Indemnity Association, Inc., by — —, Fireman's Fund Insurance Company, by — —.

[fol. 300] Marine Office Group: The American Insurance Company, by — —, American Eagle Fire Insurance Company, by — —, The Continental Insurance Company, by — —, Fidelity-Phenix Fire Insurance Company of New York, by — —, Firemen's Insurance Company of Newark, New Jersey, by — —, Glens Falls Insurance Company, by — —, The Hanover Fire Insurance Company, by — —.

Fulton Group: Agricultural Insurance Company, by — —, The Automobile Insurance Company of Hartford, Connecticut, by — —, The Home Insurance Company,

New York, by ———, United States Fire Insurance Company, by ———, Westchester Fire Insurance Company, by ———.

e. Wartimepandi Agreement of December 1, 1943 (Parts I and II and Addenda No. 1, No. 2 and No. 3)<sup>1</sup>

### Wartimepandi Agreement

#### Part I

This agreement, consisting of Parts I and II, made as of the 1st day of December, 1943, by and between the United States of America, acting by and through the Administrator, War Shipping Administration, herein referred to as the "United States", and American Steamship Owners Mutual Protection and Indemnity Association, Inc., herein referred to as "American Association", Fireman's Fund Insurance Company, herein referred to as "Fireman's Fund", and The American Insurance Company, American Eagle Fire Insurance Company, The Continental Insurance Company, Fidelity-Phenix Fire Insurance Company of New York, Fireman's Insurance Company of Newark, New Jersey, Glens Falls Insurance Company, and The Hanover Fire Insurance Company, herein referred to as "Marine Office Group", and Aetna Insurance Company, Agricultural Insur——

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<sup>1</sup> This agreement and Addenda No. 1 (at page 821). No. 2 (at page 836) and No. 3 (at page 839) renews the commercial marine protection and indemnity insurance on vessels owned by or bareboat chartered to WSA, for the period December 1, 1943, to December 1, 1944. Addendum No. 2 brings time chartered vessels under the agreement, in accordance with the revised chartering program. This agreement was extended to January 1, 1945. Certain of the provisions have been the subject of clarifying and modifying letters. (For 1942 agreements, see page 775 et seq.)



[fols. 301-302] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR  
CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including Sept. 20th, 1948, providing the statutory time has not already expired.

Fred M. Vinson, Chief Justice of the United States.

Dated this 9th day of August, 1948.

[fols. 303-304] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF  
CERTIORARI

Upon Consideration of the application of counsel for petitioner(x),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 18, 1948.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 16 day of September, 1948.

[fol. 305] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION DESIGNATING PORTIONS OF RECORD TO BE  
PRINTED—Filed September 30, 1948

For the purposes of Rule 38.8 of the Rules of the Supreme Court of the United States, it is hereby stipulated that the entire record, as filed in this Court, is deemed necessary to be printed for consideration of a petition for writ of certiorari, with the following exceptions, which are to be omitted:

1. All captions on pleadings, motions, orders, opinions and other documents, to the extent deemed to be good practice by the Clerk of the above entitled Court.

2. Page 4, consisting of the backing on the amended complaint.

3. Page 12, line 10, to p. 16, l. 9, inc., consisting of an alternative motion for new trial.

4. Pages 17 to 20, inc., consisting of a letter by the trial judge, also set forth elsewhere in said record.

5. Page 23, l. 26, to p. 26, to, but not omitting, the last paragraph of page 26, consisting of portions of the opinion of the trial judge.

6. Pages 88 to 100, inc., consisting of portions of the bill of exceptions, elsewhere set forth in said record.

7. Page 102, consisting of a certain stipulation.

8. Section 16(b) of the praecipe to the Clerk of the Supreme Court of the State of Oregon shall be omitted following the words "The following portions of the Transcript of Testimony:", with appropriate designation to indicate that the remainder of item 16(b) has been omitted.

With reference to exhibits, it is stipulated as follows:

1. That all exhibits included in the bound record as filed in this Court shall be printed, the same consisting of Plaintiff's Exhibits 2, 3, 4 and 11 and Defendant's Exhibits B (page 85), E, G, H, J and S (Exhibit "I", erroneously marked "S").

2. That the designation of said Defendant's Exhibit "S", on page 82 of said record and in the index thereof, shall be corrected by changing the same to Defendant's Exhibit "I."

3. That the exhibit appearing on page 85, consisting of a certificate of discharge, shall be designated Defendant's "Exhibit B".

4. That none of the exhibits included by the Clerk of the Supreme Court of the State of Oregon in their original form and under separate certificate shall be printed, the same being Defendant's Exhibit A and Plaintiff's Exhibits 1, 5, 6, 7, 8, 9, 10, 12 and 13, but that all of said exhibits shall remain as parts of the record in the case, and that any portions of said exhibits may be referred to by the Court or by either party in briefs or in arguments.

5. That Defendant's Exhibits D, F, K and L, which were originally omitted by the Clerk of the Supreme Court of the

State of Oregon in preparing said record and are being forwarded under an amended separate certificate to the Clerk of this Court, are to be printed as parts of the record herein with the following exceptions:

(a) With reference to Defendant's Exhibit F, consisting of certain shipping articles, a photostatic copy may be included, or, if printed, the following portions of said exhibit may be omitted:

1. The table on page 1 entitled "Scale of Provisions, etc.", and the first two paragraphs under the heading "Substitutes", on page 1.

2. It is stipulated that following the typed insert signed by Thomas C. Price as master, on page 1 of said exhibit, and in lieu of the portions of said exhibit partially covered by said insert, the following shall be printed:

[fol. 307] "In Witness Whereof, the said parties have subscribed their names hereto on the days against their respective signatures mentioned."

(Signed) Thomas C. Price, Master, of 345 Florence Street, Manaroneck, N. Y., on the 8th day of June, 1943."

3. Omit all foot-notes on page 1 and the lines following the same, inserting appropriate designation to indicate that a portion of the document has been omitted.

4. The column of the names of seamen who signed on page 2 of said exhibit (i. e., the page containing the signature of Fred W. Fink), and the column entitled "In What Capacity", shall be printed, but all other columns shall be omitted, with appropriate designations to indicate that such columns have been omitted.

5. Pages 3 and following shall be omitted, except the letter on page 3, dated September 10, 1943, from the War Shipping Administration to the U. S. Coast Guard.

6. All omitted portions of said exhibit shall remain as parts of the record of said case and may be referred to by the Court or by the parties in briefs or in arguments.

(b) With reference to Defendant's Exhibit D, the form of agreement entitled "Service Agreement For Vessels of which the War Shipping Administration is Owner or Owner Pro Hac Vice", consisting of eight pages, an exhibit and certificate, and the form of agreement entitled



"Service Agreement for Vessels Time Chartered From Others by the War Shipping Administration", consisting of eleven pages and a certificate, may be omitted in printing, but the said forms of agreement shall remain as parts of the record of said case and may be referred to by the Court or by either party in briefs or in arguments.

(c) With reference to Defendant's Exhibit K, only the original copy thereof need be printed.

6. That Defendant's Exhibit C was also omitted by the Clerk of the Supreme Court of the State of Oregon in preparing said record, and that the following document, attached hereto and marked "Defendant's Exhibit C", is a true copy of said exhibit and should be printed as a part of the record herein.

It is stipulated that in determining the appropriate place in said record in which to print the above designated ex-[fol. 308] hibits and portions thereof, as well as the other portions of the record in this case, the Clerk of the above entitled Court shall exercise his discretion in accordance with the established custom and practice of said Court, but that in the absence of such custom or practice said exhibits shall be appended at the back of said record rather than inserted in the transcript of testimony at the points where said exhibits were admitted into evidence.

Dated September 28, 1948.

Edwin D. Hicks, of Attorneys for Petitioner;  
Erskine R. Wood, of Attorneys for Respondent.

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[fol. 309] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 22, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Oregon is granted. The case is transferred to the summary docket and assigned to follow Nos. 179 and 351.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

132  
CLERK'S COPY.

**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1948**

**No. 430**

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**ISAAC GAYNOR, PETITIONER,**

**vs.**

**AGWILINES, INC.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**PETITION FOR CERTIORARI FILED OCTOBER 16, 1948**

**CERTIORARI GRANTED NOVEMBER 12, 1948**

IN THE  
**United States Circuit Court of Appeals**  
FOR THE THIRD CIRCUIT.

**No. 9580.**

**ISAAC GAYNOR,**

*Appellant,*

*v.*

**AGWILINES, INC.**

**Appeal From Orders of the District Court of the United  
States for the Eastern District of Pennsylvania.**

**Appendix to Brief for Appellant.**

**ABRAHAM E. FREEDMAN,**

**FREEDMAN, LANDY AND LORRY,**

900 Jefferson Building,

1015 Chestnut Street,

Philadelphia 7, Penna.

*Attorneys for Appellant.*



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## Appendix.

### RELEVANT DOCKET ENTRIES.

- Aug. 27, 1946. Complaint filed.
- Aug. 27, 1946. Summons exit.
- Aug. 27, 1946. Plaintiff's demand for jury trial filed.
- Sept. 10, 1946. Summons returned: "on Sept. 3, 1946 served" and filed.
- Sept. 30, 1946. Order of Court extending time for filing answer to October 30, 1946 filed. 10/1/46 noted.
- Oct. 30, 1946. Answer, filed.
- Mar. 27, 1947. Order to place case on trial list, filed.
- June 6, 1947. Order to place case on the Argument List on stipulation of facts filed.
- June 13, 1947. Stipulation of facts, filed.
- June 23, 1947. Argued sur pleadings and proofs. C. A. V.
- Nov. 26, 1947. Opinion, Ganey, J. dismissing action without prejudice filed.
- Nov. 26, 1947. Judgment dismissing action without prejudice filed. 11/28/47 noted and notice mailed.
- Dec. 11, 1947. Hearing sur motion for reargument. C. A. V.
- Dec. 29, 1947. Order of Court confirming conclusion reached in Opinion of Nov. 26, 1947 in conformity with a supplemental opinion to be filed, filed. 12/30/47 noted and notice mailed.

*Relevant Docket Entries*

- Dec. 31, 1947. Plaintiff's Notice of Appeal, filed. 1/2/48  
Copy to Krusen, Evans and Shaw.
- Dec. 31, 1947. Copy of Clerk's Notice of Appeal to U. S.  
Circuit Court of Appeals, filed.
- Jan. 21, 1948. Supplemental Opinion, Ganey, J., affirm-  
ing Opinion filed, Nov. 26, 1947 in ac-  
cordance with Order filed Dec. 29, 1947,  
filed.
- Jan. 23, 1948. Order of Court directing that original rec-  
ord be transmitted to U. S. Circuit  
Court of Appeals, filed. 1/26/47 Noted.
- Jan. 30, 1948. Designation of Record on appeal, filed.



**STIPULATION OF FACTS.**

1. Plaintiff, ISAAC GAYNOR, at all times mentioned herein, is and was a seaman in the United States Merchant Marine and was a citizen and resident of Philadelphia.

2. Defendant, AGWILINES, INC., is, and at all times mentioned herein, was a corporation duly organized and existing under and by virtue of the laws of the State of Maine.

3. On the 25th day of December, 1945, and at all times mentioned herein, the S. S. "Christopher Gadsden", was operated by defendant under an agreement of General Agency with the United States.

4. On the 10th day of September, 1945, plaintiff entered into shipping articles with the defendant as a member of the crew of the S. S. "Christopher Gadsden" in the capacity of utility man at the rate of \$87.50 plus bonus, overtime and found on a foreign voyage from Philadelphia, Pa., to undisclosed ports anywhere in the world and return, for a period not exceeding twelve months. A true and correct copy of the shipping articles are attached hereto and marked "Exhibit A." On October 1, 1945, the said rate of pay was increased to \$132.50 per month, plus bonus, overtime and found.

5. On the 24th day of December, 1945, while the S. S. "Christopher Gadsden" was berthed in the port of Charleston, South Carolina, plaintiff, having first obtained shore leave, left the vessel about 5:00 o'clock P. M. intending to visit relatives in Rand, South Carolina, plaintiff thereafter purchased a bus ticket from Charleston to Walterboro, which was the nearest stop to Rand, South Carolina.

6. On the 25th day of December, 1945, plaintiff boarded a Greyhound bus at Charleston, South Carolina, as a passenger and at or about 6:30 o'clock P. M., the said bus, en route to Walterboro, became involved in an accident on the

*Stipulation of Facts*

highway about thirty miles from Charleston, in connection with which plaintiff sustained certain injuries. See medical abstracts from the U. S. Marine Hospitals attached hereto and marked "Exhibits B, C and D."

7. As a result of the injuries aforesaid, plaintiff has been disabled and unable to re-engage in his occupation and has been under medical care up to the present time.

8. Plaintiff received earned wages covering the period from September 10, 1945, to December 28, 1945. A true and correct copy of the payroll voucher is attached hereto and marked "Exhibit E."

9. At the time the plaintiff left the S. S. "Christopher Gadsden" on December 24, 1945, he left on board certain of his clothing, baggage and personal effects. Plaintiff has demanded the return of the said personal effects and defendant has been unable to locate the said personal effects and has failed to make any accounting or to compensate plaintiff for their loss to the plaintiff. Plaintiff contends that the various items of personal effects are hereafter set forth in Exhibit "F."

FREEDMAN, LANDY AND LOBBY,

By WILLIAM M. ALPER,

*Attorneys for Plaintiff.*

KRUSEN, EVANS AND SHAW,

By ROWLAND C. EVANS, JR.,

*Attorneys for Defendant.*

**SERVICE AGREEMENT FOR VESSELS OF WHICH  
THE WAR SHIPPING ADMINISTRATION IS  
OWNER OR OWNER PRO HAC VICE.**

THIS AGREEMENT, made as of March 8, 1942, between the UNITED STATES OF AMERICA (herein called the "United States") acting by and through the Administrator, War Shipping Administration, and AGWILINES, INC., a corporation organized and existing under the laws of Maine, and having its principal place of business at New York, New York, (herein called the "General Agent").

**WITNESSETH:**

That in consideration of the reciprocal undertakings and promises of the parties herein expressed:

**ARTICLE 1.** The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time.

**ARTICLE 2.** The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose.

**ARTICLE 3A.** To the best of its ability, the General Agent shall for the account of the United States:

(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyage, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices;



*Service Agreement for Vessels*

(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States for all moneys collected or disbursed by it or its agents;

(c) Equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe;

(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.

(e) Issue or cause to be issued to shippers customary freight contracts and Bills of Lading. Unless the United States shall otherwise instruct, such Bills of Lading shall contain all exemptions and stipulations usual to the particular trade or service in which the vessels may be engaged, and reserve a lien upon all cargoes for the payment of freight, primage charges

dead freight, demurrage, forwarding charges, advance charges for carriage to port of shipment, for contributions in general average and special charges on cargo and for all fines or penalties which the vessels or cargoes may incur by reason of illegal, incorrect or insufficient marking or addressing of packages or description of their contents. After a uniform Bill of Lading shall have been adopted by the United States, such Bill of Lading shall be used in all cases as soon as practicable after receipt thereof by the General Agent, with such modifications as shall be necessary for the particular trades in which the vessels hereunder shall from time to time be employed. Pending the issuance of such uniform Bill of Lading, the General Agent may continue to use its usual commercial form of Bill of Lading.

As soon as practicable after April 1, 1942, all Bills of Lading shall be issued by the General Agent or its agents as agent for the Master and the signature clause may provide substantially that the General Agent makes no warranty or representation as to the authority of the United States or the Master to enter into the agreement, and that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof.

ARTICLE 3B. The General Agent agrees, without prejudice to its rights under the provisions of Articles 8 and 16 hereof, to:

(a) Perform the duties required to be performed by it hereunder in an economical and efficient manner, and exercise due diligence to protect and safeguard the interests of the United States in all respects and to avoid loss and damage of every nature to the United States;

(b) Exercise due diligence to see that all Bills of Lading are properly issued, all wharf receipts for

## *Service Agreement for Vessels*

freight are non-negotiable, and, where required, a freight contract or permit is issued for each shipment;

(c) Furnish and maintain during the period of this Agreement, at its own expense, a bond with sufficient surety, in such amount as the United States shall determine, such bond to be approved by the United State as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the General Agent contained in this Agreement, including, without limitation of the foregoing, the condition faithfully to account to the United States for all funds collected and disbursed and funds and property received by the General Agent or its agents. The General Agent may, in lieu of furnishing such bond, pledge direct or fully guaranteed obligations of the United States of America of the face value of the penalty of the bond under an agreement satisfactory in form to the United States;

(d) Without the consent of the United States, not sell, assign or transfer, either directly or indirectly or through any reorganization, merger or consolidation, this Agreement or any interest therein, nor make any agreement or arrangement whereby the service to be performed hereunder is to be performed by any other person, whether an agent or otherwise, except as provided in Article 6 hereof.

ARTICLE 4. (a) The General Agent and, to the extent required by the United States, every related or affiliated company or holding company of the General Agent, authorized as provided in Article 13 hereof, to render any service or to furnish any stores, supplies, equipment, provisions, materials, or facilities which are for the account of the United States under the terms of this Agreement, shall (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and



maintenance of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States; and (2) file, upon notice from the United States, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which, in the opinion of the United States, affect the results in, the performance of, or transactions or operations under this Agreement.

(b) The United States is hereby authorized to examine and audit the books, records and accounts of all persons referred to above in this Article whenever it may deem it necessary or desirable.

(c) Upon the willful failure or willful refusal of any person described in this Article to comply with the provisions of this Article, the United States may rescind this Agreement.

ARTICLE 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine: Provided, That with respect to vessels allocated before February 25, 1942, compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942. Such compensation shall be deemed to cover, but without limitation, the General Agent's administrative and general expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than taxes for which the General Agent is reimbursed under Article 7 hereof), and any other expenses which are not directly and

exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder.

ARTICLE 6. The General Agent shall exercise due diligence in the selection of agents. Such agents shall be subject to disapproval by the United States and any agency agreement shall be terminated by the General Agent whenever the United States shall so direct. Any compensation payable by the General Agent to its agents for services rendered in connection with the vessels assigned hereunder shall be subject to approval by the United States. In the event that any of the vessels covered by this Agreement are operated in a service in which an American citizen maintained a berth operation with American flag vessels on September 1, 1939, the General Agent, upon request of the United States, will assign such vessels to such berth operators as agents as may be appropriate under form of agreement prescribed by the United States. Agency fees or equivalent allowances for branch offices in accordance with schedules approved by the United States will be reimbursable under Article 7 hereof.

ARTICLE 7. The United States shall reimburse the General Agent at stated intervals determined by the United States for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder) and any other expenses which are not directly or exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. The General Agent shall be reimbursed for sales and similar taxes or foreign

taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder if the General Agent shall have used due diligence to secure immunity from such taxation. To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures (accruing during the term hereof) in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements, or by action of the Maritime War Emergency Board, any payments made by the General Agent to a pension fund in accordance with a pension plan in effect on the effective date of this Agreement with respect to the officers and members of the crew of said vessels who are entitled to benefits under such plan, on the effective date of this Agreement, for the amount of any Social Security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise. The United States may disallow, in whole or in part, as it may deem appropriate, and deny reimbursement for, expenses which are found to have been made in willful contravention of any outstanding instructions or which were clearly improvident or excessive.

Any moneys advanced to bonded persons by the General Agent for ship disbursements which are lost by reason of a casualty to the Vessel on which the money so advanced is carried shall in the event of such loss be considered an expense of the General Agent, subject to reimbursement as is in this ARTICLE 7 provided.

The United States may advance moneys to the General Agent to provide for disbursements hereunder in accordance with such regulations or conditions as the United States may from time to time prescribe.



**ARTICLE 8.** The United States, shall without cost or expense to the General Agent, procure or provide insurance against all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder (which insurance shall include the General Agent and the vessel personnel as assureds) including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage caused to other vessels, persons or property, and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance. The General Agent shall furnish reports and information and comply fully with all instructions that may be issued with regard to all salvage claims, damages, losses or other claims. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to such risks. The United States may assume any of the foregoing risks except those relating to P. & I. risks and collision liabilities. At all times during the period of this Agreement, the United States shall at its own expense provide and pay for insurance with respect to each vessel hereunder against protection and indemnity marine and war risks, and collision liabilities without limit as to liability as to the amount of any claim or the aggregate of any claims thereunder. The United States at its election may write all or any such insurance, including that against P. and I. and collision liabilities, in its own fund, pursuant to a duly executed policy or policies. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to any of the foregoing risks. All insurance hereunder shall cover both the United States and the General Agent.

**ARTICLE 9.** In the event of general average involving vessels assigned to the General Agent under this Agree-

ment, the General Agent shall comply fully with all instructions issued by the United States in that connection including instructions as to the appointment of adjuster, obtaining general average security and asserting liens for that purpose unless otherwise instructed, and supplying the adjuster with all disbursements accounts, documents and data required in the adjustment, statement and settlement of the general average. Reasonable compensation for and general average allowances to the General Agent in such cases shall be in accordance with directions, orders or regulations of the United States.

ARTICLE 10. Salvage claims for services rendered to vessels other than vessels owned or controlled by the United States shall be handled by, and be under the control of, the United States. Salvage awards for services rendered to other vessels owned or controlled by the United States including the vessels hereunder shall be made by the United States. The General Agent shall furnish the United States with full reports and information on all salvage services rendered.

ARTICLE 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice.

(b) Upon giving to the United States thirty (30) days' written or telegraphic notice, the General Agent shall have the right to terminate this Agreement, but termination by the General Agent shall not become effective as to any vessel until her arrival and discharge at a continental United States port.

(c) This Agreement may be terminated, modified, or amended at any time by mutual consent.

ARTICLE 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or

otherwise, all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement, shall be immediately turned over to the United States, at times and places to be fixed by the United States, and the United States may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid: Provided, That the General Agent shall, if required by the United States, adjust, settle and liquidate the current business of the vessels. Notwithstanding the foregoing provisions, when the United States shall so direct, the General Agent shall complete the business of voyages commenced prior to the date as of which the Agreement shall be terminated, and, if directed by the United States and subject to any instructions issued by the United States with respect thereto, the General Agent shall continue to book cargo for the vessels for the next voyages after the termination of this Agreement. No such termination of this Agreement shall relieve either party of liability to the other in respect of matters arising prior to the date of such termination or of any obligation hereunder to indemnify the other party in respect to any claim or demand thereafter asserted, arising out of any matter done or omitted prior to the date of such termination.

**ARTICLE 13.** Agreements or arrangements with any interested or related company to render any service or to furnish any stores, supplies, equipment, materials, repairs, or facilities hereunder shall be submitted to the United States for approval as to employment. Unless and until such agreements or arrangements have been approved by the United States, compensation paid to any interested or related company shall be subject to review and readjustment by the United States. In connection with such review and readjustment, the United States may deny reimbursement hereunder of any portion of such compensation which it deems to be in excess of fair and reasonable compensation. The United States may also deny reimbursement, in



whole or in part, of compensation under any arrangement or agreement, with an interested or related company which it deems to be exorbitant, extortionate or fraudulent. The term "interested company" shall mean any person, firm, or corporation in which the General Agent, or any related company of the General Agent, or any officer or director of the General Agent, or any employee of the General Agent who is charged with executive or supervisory duties, or any member of the immediate family of any such officer, director or employee, or any officer or director of any related company of the General Agent or any member of the immediate family of an officer or director of any related company of the General Agent, owns any substantial pecuniary interest directly or indirectly. The term "related company", used to indicate a relationship with the General Agent for the purposes of this Article only, shall include any person or concern that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the General Agent. The term "control" (including the terms "controlled by" and "under common control with") as used herein means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the General Agent (or related company), whether through ownership of voting securities, by contract, or otherwise.

**ARTICLE 14.** The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the

vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable.

ARTICLE 15. The United States shall, when it may legally do so, have the advantage of any existing, or future, contracts of the General Agent for the purchase or rental of materials, fuel, supplies, facilities, services, or equipment, if this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the General Agent.

ARTICLE 16. (a) The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, claims for damages for personal injury or loss of life, and claims for maintenance and cure.

(b) In view of the extraordinary wartime conditions under which vessels will be operated hereunder, the General Agent shall be under no responsibility or liability to the United States for loss or damage to the vessels arising out of any error of judgment or any negligence on the part of any of the General Agent's officers, agents, employees, or otherwise. However, the General Agent may be held liable

for loss or damage not covered by insurance or assumed by the United States as required under Article 8 of this Agreement, if such loss or damage is directly and primarily caused by willful misconduct of principal supervisory shoreside personnel or by gross negligence of the General Agent in the procurement of licensed officers or in the selection of principal supervisory shoreside personnel.

(c) In the event that the General Agent shall perform any stevedoring, terminal, ship repair or similar service for the vessels hereunder at commercial rates, the General Agent shall have all the obligations and responsibilities of the person performing such services under the standard or other approved form of contract with the United States, or in the absence of such standard or approved form, under usual commercial practice.

(d) The General Agent shall be under no liability to the United States of any kind or nature whatsoever in the event that the General Agent should fail to obtain officers or crews for the operation of the vessels, or fail to arrange for the fitting out, refitting, maintenance or repair of said vessels, or fail to perform any other service hereunder by reason of any labor shortage, dispute or difficulty, or any strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the General Agent whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities.

ARTICLE 17. Wherever and whenever herein any right, power, or authority is granted or given to the United States, such right, power, or authority may be exercised in all cases by the War Shipping Administration or such agent or agents as it may appoint or by its nominee, and the act or acts of such agent or agents or nominee, when taken, shall constitute the act of the United States hereunder. In performing its service hereunder, the General Agent may rely upon the instructions and directions of the Adminis-



trator, his officers and responsible employees, or upon the instructions and directions of any person or agency authorized by the Administrator. Wherever practicable, the General Agent shall request written confirmation of any oral instructions or directions so given.

ARTICLE 18. (a) The General Agent warrants that it has not employed any person to solicit or secure this Agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this Agreement or in its discretion to deduct from any amount payable hereunder the amount of such commission, percentage, brokerage or contingent fee.

(b) In any act performed under this Agreement, the General Agent and any subcontractor shall not discriminate against any citizen of the United States on the ground of race, creed, color or national origin.

ARTICLE 19. No person elected or appointed a member of or delegate to Congress or a Resident Commissioner, directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account shall hold or enjoy this Agreement in whole or in part, except as provided in Section 206, Title 18, U. S. C. The General Agent shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

ARTICLE 20. Subject to the provisions of Article 5 hereof, this Agreement is in substitution of and hereby abrogates and replaces the so-called 1¢ Bareboat Charter Agreements relating to the assignment or allocation to the General Agent of the vessels listed on Exhibit A hereto from the dates stated on such Exhibit. Preference Agreements relating to such allocated vessels shall be terminated and abrogated as of the same dates.

All rights and obligations of the parties under said abrogated Bareboat Charter and Preference Agreements

are hereby cancelled and this Agreement is made retro-active to the cancellation dates thereof as stated on Exhibit A hereto. However, the General Agent shall be reimbursed for any expenditure made before the earliest permissible cancellation date after March 22, 1942, under said agreements to the extent that such expenditure would have been considered in computing additional charter hire or freight under such agreements. This Agreement, unless sooner terminated, shall extend until six months after the cessation of hostilities.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in triplicate the day and year first above written.

UNITED STATES OF AMERICA

By: E. S. LAND,

*Administrator, War Shipping  
Administration.*

By D. F. HOULIHAN,

*For the Administrator.*

AGWILINES, INC.,

By L. D. PARMELEE,

*Exec. Vice Pres.*

Attest:

A. G. DETT,

*Secretary.*

Approved as to form:

NAME (Illegible)

*General Counsel,*

*War Shipping Administration.*

*Service Agreement for Vessels*

I, A. G. Dett, certify that I am the duly chosen, qualified, and acting secretary of Agwilines Inc. a party to this Agreement, and, as such, I am the custodian of its official records and the minute books of its governing body; that L. D. Parmelee who signed this Agreement on behalf of said corporation, was then the duly qualified Executive Vice President of said corporation; that said officer affixed his manual signature to said Agreement in his official capacity as said officer for and on behalf of said corporation by authority and direction of its governing body duly made and taken; that said Agreement is within the scope of the corporate and lawful powers of this corporation.

A. G. DETT,  
*Secretary.*

(CORPORATE SEAL)



**DELIVERY CERTIFICATE.**

**WAR SHIPPING ADMINISTRATION.**

**December 31, 1942**

THIS IS TO CERTIFY THAT the S/S CHRISTOPHER GADSEN, owned by the UNITED STATES OF AMERICA, represented by the WAR SHIPPING ADMINISTRATION, was on the 31st day of December, 1942, at 7:00 P. M., E. W. T., delivered at the port of Wilmington, North Carolina by War Shipping Administration to Agwilines, Inc. UNDER TERMS AND CONDITIONS OF "Service Agreement, Form GAA" said agreement having been executed March 8, 1942 having on board fuel, stores and equipment as per inventories taken on date of delivery.

**WAR SHIPPING ADMINISTRATION**

By (Sgd.) A. E. ROENTGEN

A. E. Roentgen

*Supply Officer.*

**AGWILINES, INC.**

By Southeastern Shipping Service

By (Sgd.) ROGER STURGES RILEY

Roger Sturges Riley

**APPROVED:**

(Sgd.) G. F. BLAIR

*District Manager*

**War Shipping Administration**

**Port of Norfolk, Virginia**

*Redelivery Certificate***REDELIVERY CERTIFICATE.**

**RECEIPT FOR REDELIVERY OF THE S. S. "CHRISTOPHER  
GADSEN"**

(Official No. 242665)

The WAR SHIPPING ADMINISTRATION hereby accepts from AGWILINES, INC. redelivery of the S. S. "CHRISTOPHER GADSEN" as at 12:00 Midnight, Central Standard Time, June 18, 1946, at Galveston, Texas under Service Agreement, Form GAA (Contract, WSA-186, dated March 8, 1942) having on board fuel, water, stores and equipment as per inventories taken on the date of redelivery. /

WAR SHIPPING ADMINISTRATION

By (Signed) W. G. YUNG

W. G. Yung

*Operations Supervisor*

AGWILINES, INC.

By (Signed) M. O. FANO

M. O. Fano

*Assistant to Vice President*

## OPINION.

November 26, 1947

GANEY, J.:

This is a civil action for wages, maintenance and cure, and for the value of personal effects by a seaman against the defendant which operated a merchant vessel under a general agency agreement entered into between it and the United States through the War Shipping Administration.

The facts are not in dispute and they may be set forth briefly as follows: On September 10, 1945, the plaintiff signed shipping articles to become a member of the crew of the Steamship Christopher Gadsden in the capacity of a utility man at the rate of Eighty Seven and 50/100 Dollars (\$87.50) plus bonus, overtime and found for a voyage from Philadelphia, Pennsylvania, to any port in the world for a period not to exceed twelve months. The defendant operated the vessel under a general agency agreement with the United States through the War Shipping Administration. On October 1, 1945, the plaintiff's rate of pay was increased to One Hundred Thirty Two and 50/100 Dollars (\$132.50) per month. On December 24, 1945, while the vessel was in the port of Charleston, South Carolina, the plaintiff obtained shore leave. On Christmas Day, the plaintiff, with the intention of visiting his relatives in Rand, South Carolina, boarded a bus for Walterboro, which was the nearest stop to Rand. While it was on the highway, thirty miles from Charleston, the bus was involved in an accident in which the plaintiff was injured. As a result of the injuries sustained by him, he was unable to resume his usual occupation and duties, and, at least up to the time this action was brought, he has been under medical care. The plaintiff has received wages earned by him covering the period from September 10, 1945, to December 28, 1945. However, the defendant has refused the plaintiff's demand and claim for wages for the period from December 28, 1945 to the date of the unexpired portion of the voyage, for



*Name of Ship*

S/S CHRISTOPHER GADSDEN  
 Operating Company on This Voyage  
 AGWILINES, INC., as gen agts. for  
 WSA

It is also agreed that ALL DECISIONS AMENDMENTS AND ATTACHMENTS OF THE MARITIME WAR EMERGENCY BOARD SHALL APPLY TO AND BECOME A PART OF THIS AGREEMENT  
 WAR SHIPPING ADMINISTRATION OPERATIONS REGULATIONS NOS. 55-72 and 64 REVISED DATED JANUARY 6, 1945 TO APPLY AND BECOME PART OF THIS AGREEMENT

In Witness Whereof the said parties have subscribed their names hereto on the days against their respective signatures mentioned.

(S.) John J. Kelly, Master, of 1005 Meadow Road, Glencoe, Ill., on the 7th day of September, 1945."

[fol. 43] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
 FOR THE THIRD CIRCUIT

No. 9580

ISAAC GAYNOR, Appellant,

v.

AGWILINES, INC.

MOTION TO DISMISS APPEAL—Filed January 12, 1948

Appellant, Isaac Gaynor, by his counsel, Messrs. Freedman, Landy and Lorry, respectfully moves Your Honorable Court to dismiss the appeal taken in the instant matter without prejudice for the following reasons:

1. The within cause of action is by a seaman seeking to recover wages and maintenance and cure against the private operator of the vessel.

The vessel was owned by the United States, but was operated by the respondent, Agwilines, Inc., under the provisions of a so called general agency agreement.

maintenance and cure for the period of his disability, and for the value of his personal effects which he alleged were left aboard the vessel.

Before we may pass to the question of the liability of the defendant, we must first determine whether the plaintiff can maintain this action. In its answer to the complaint, the defendant alleged that the plaintiff has failed to comply with the provisions of the Clarification Act of 1943.<sup>1</sup> Section 1 (a) of the Act, 50 U. S. C. A. Appendix Sec. 1291 (a), as is pertinent here, provides: "Officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . (3) collection of wages and bonuses . . . have all the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels . . .". The Act further provides: "Any claim referred to in clause . . . (3) hereof, shall if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act (Title 46, Secs. 741-752), notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act . . . When used in this subsection the term 'administratively disallowed' means a denial of a written claim in accordance with the rules or regulations prescribed by the Administrator, War Shipping Administration, . . .". (As of September 1, 1946, all functions, powers and duties of the War Shipping Administration have been transferred to the United States Maritime Commission<sup>2</sup>). On April 22, 1943, the War Shipping Administration issued General Order 32<sup>3</sup> wherein were contained certain provisions requisite to

1. Act of March 23, 1943, c. 26, 57 Stat. 45-51, as amended, 50 U. S. C. A. Appendix, Secs. 1291-1295.

2. Section 202 of the Act of July 8, 1946, c. 543, Title 46, 60 Stat. 501, 50 U. S. C. A. Appendix, Sec. 1291, note.

3. 8 F. R. 5414, 46 CFR, Cum. Supp. 304.20-304.29.

[fol. 44] 2. The cause was submitted to the Honorable J. Cullen Ganey without a jury, upon a stipulation of fact, but was dismissed without consideration of the merits of the case, for the reason that the respondent, as general agent, was not suable under the terms of the contract, and the libel was, therefore, dismissed. This appeal was taken from that dismissal,

3. It appears that most of the seamen's cases presently on the trial list in the United States District Court for the Eastern District of Pennsylvania involve the same general agency agreement as is involved in the instant case, and the district judges have, therefore, agreed to hear the argument by the Court en banc, in order to fix a uniform policy to govern all of the cases on the docket. The District Court has fixed February 10th as the date when it will sit en banc.

Wherefore, leave is respectfully requested to dismiss this appeal, so that the cause may be presented to the District Court for re-argument.

Freedman, Landy and Lorry, by (S.) Abraham E. Freedman.

[File endorsement omitted.]

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[fol. 45] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE THIRD CIRCUIT

[Title omitted]

Present: Maris, Goodrich and O'Connell, Circuit Judges.

ORDER DENYING MOTION TO DISMISS APPEAL—Filed January  
19, 1948

Upon consideration of the appellant's motion to dismiss the appeal in the above-entitled cause, and after oral argument on the motion,

It is ordered that the motion to dismiss be, and the same is hereby denied.

By the Court, Maris, Circuit Judge.  
January 19, 1948.

[File endorsement omitted.]



the filing of claims with the Administration or its General Agents. The pertinent sections of the Order appear in *Rodinciuc v. United States*, E. D. Pa., — F. Supp. —, — (decided June 10, 1947) and therefore they need not be set forth here. The plaintiff has complied with Section 304.25 of the order by filing a claim with the General Agent of the vessel, which has disallowed the claim. Therefore, the plaintiff is entitled to enforce his claim by court action. However, such action must be brought, since the plaintiff was an employee of the United States through the War Shipping Administration at the time the cause of action arose, in accordance with the terms of the Clarification Act, which provides that the action must be brought pursuant to the Suits in Admiralty Act. Therefore, if he is to recover at all, the plaintiff must bring his action against the United States pursuant to the provisions of the Suits in Admiralty Act, and not against the defendant herein. See *United States v. Lubinski*, 9 Cir., 153 F. (2) 1013.

In the cases of *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 66 S. Ct. 1218, 90 L. Ed. 1534 and *Arid v. Weyerhaeuser Steamship Company*, 3 Cir., — F. (2) — (decided September 16, 1947), the cause of action arose prior to the enactment of the Clarification Act, and since the plaintiffs in each case did not elect to sue under it, the Act was inapplicable. In *Caldarola v. Eckert*, — U. S. — (decided June 23, 1947), the plaintiff was a longshoreman, and since the Clarification Act concerns "seamen", the Act was of no consequence.

Accordingly, the action is dismissed without prejudice to the plaintiff.

**SUPPLEMENTAL OPINION.**

January 21, 1948.

GANNEY, J.:

This is a request for a rehearing of the Court's determination that no civil action for wages, maintenance and cure, and for loss of personal effects can be maintained against the defendant under the facts as set forth in this Court's opinion of November 26, 1947. The request was granted at the insistence of counsel for the plaintiff who asked that the Clarification Act and certain alleged pertinent authorities be reviewed in the light of the fact that by reason of this Court's holding the rights of seamen employed through the War Shipping Administration would be curtailed.

During the acquisition of substantially our entire Merchant Marine by the United States through the War Shipping Administration and its predecessors, a number of legal problems with respect to the rights of the seamen, employed to man the vessels were created. These seamen, as expressed by their representatives, desired rights enjoyed by seamen employed on privately owned vessels such as those under the Jones Act as well as the existing bargaining agreements entered into between the private vessel owners and the labor unions in preference to those afforded by Federal statutes enacted for the benefit of government employees. The policy of the War Shipping Administration of attempting to give the seamen employed by it the preferred rights was hindered by the fact that they were technically government employees. In this status they could not earn credits toward benefits provided by the Social Security Act while at the same time they were excluded from the benefits of the Civil Service Retirement Act by Executive order. Doubt prevailed since it was thought their rights varied because they were made to depend on the fortuitous relationship<sup>1</sup> of the War Shipping

1. Prior to *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, 66 S. Ct. 1218, 90 L. Ed. 1534 (June 10, 1946).

[fol. 46] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE THIRD CIRCUIT

[Title omitted]

Present: Biggs and Maris, Circuit Judges.

ORDER SETTING CASE FOR HEARING BY THE COURT EN BANC

It is hereby ordered that the above-entitled case be heard by the court en banc, and be set down for hearing on Wednesday, February 18, 1948.

By the Court, Maris, Circuit Judge.  
January 28, 1948.

[File endorsement omitted.]

[fol. 47] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9580

ISAAC GAYNOR, Appellant,

v.

AGWILINES, INC.

On Appeal from the Judgment and Order of the District Court of the United States for the Eastern District of Pennsylvania.

Argued February 18, 1948

Before Biggs, Maris, Goodrich, McLaughlin and O'Connell,  
Circuit Judges

OPINION OF THE COURT—Filed August 4, 1948

By MARIS, Circuit Judge:

The plaintiff, Isaac Gaynor, an American seaman, on September 10, 1945, signed shipping articles as a member of the crew of the S. S. Christopher Gadsden for a foreign voyage from Philadelphia for a period not exceeding twelve months. The Christopher Gadsden was a vessel built



Administration or the nature<sup>2</sup> of, the vessels on which they were employed. Thus if the vessel was owned by, or bareboat-chartered to, the War Shipping Administration, the crew became technically employees of the government; on the other hand, if the vessel was time-chartered to the Administration, the crew remained the private employee of the vessel's owner. In addition the exact status of these seamen was further confused when vessels of the Administration were chartered or made available to another department or agency of the United States. Because of the provisions of the Suits in Admiralty Act provided that suits thereunder may be brought only if the ship involved is a merchant vessel or a tugboat, a seaman employed on a public vessel could not sue the United States for damages. As a result of the conditions hereinabove adverted to, it could not always be determined with any amount of certainty whether a vessel in question was technically a public or a merchant vessel, and as a consequence these seamen were made to rely upon the policy of the Administration for an adjustment of their claims for such injuries.

In 1930 the Supreme Court in *United States Shipping Board Emergency Fleet Corporation v. Lustgarten* (No. 32), 280 U. S. 320, held that a seaman could not recover from the private operator for injuries sustained by him while he was employed on a merchant vessel owned by the United States. The Court based its decision on the rule that the remedies given by the Suits in Admiralty Act were exclusive in all cases where a libel might be filed under it. However on January 18, 1943, in *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, the Supreme Court, in modifying the broad rule laid down in the *Lustgarten* case, held that the Suits in Admiralty Act did not save the private operator working under a general agency agreement from suit to recover damages for injuries sustained by a third person as a result of its negligent operation of a merchant vessel owned by the United States.

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2. Prior to *Lauro v. United States*, 330 U. S. 446, 458-460, 67 S. Ct. 847, 91 L. Ed. —, sub nom. *American Stevedores, Inc. v. Porello*. (March 10, 1947.)

and owned by the United States and was being operated for the United States by the War Shipping Administration which had appointed the defendant Agwilines, Inc., as general agent for the vessel under the standard form of general [fol. 48] agency service agreement in use during World War II.<sup>1</sup>

On December 24, 1945 the Christopher Gadsden put in at the port of Charleston, South Carolina. While it was in port the plaintiff obtained shore leave and left the vessel intending to visit relatives in Rand, South Carolina. En route from Charleston as a passenger on a bus on December 25, 1945 he was injured in a highway accident as a result of which he was so disabled as to be unable to rejoin the ship or reengage in his occupation as a seaman. He was paid his wages from September 10 to December 28, 1945. Thereafter he brought the present civil action against the defendant in the district court for the Eastern District of Pennsylvania for the balance of his wages to the end of the voyage, for maintenance and cure for the period of his disability, and for the value of his clothing and personal effects which he left on the vessel and which had not been returned to him. He sought the same relief against the United States in an admiralty suit which he filed in the same court under the Suits in Admiralty Act. The district court dismissed the present complaint without prejudice upon the ground that the plaintiff's sole remedy was his suit in admiralty against the United States and that under the War Shipping Administration Clarification Act he was precluded from enforcing his claim against the defendant, the general agent of the War Shipping Administration. The case thus presents for our consideration the meaning and effect of the Clarification Act of March 24, 1943, 57 Stat. 45 (50 U. S. C. Appendix § 1291), the pertinent provisions of which are set out in a footnote.<sup>2</sup>

<sup>1</sup> The form of agreement was in all essential respects the same as that which was before the court in *Caldarola v. Eckert*, 332 U. S. 155 (1947). It was authorized by General Order 21 of the War Shipping Administration issued September 22, 1942, 7 F. R. 7561, and also appears in full text in 46 C. F. R. Cum. Supp. § 306.44.

<sup>2</sup> "That (a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or for-

[fol. 49] Upon reading the act certain things are at once clear. The first is that it applies only to seamen who are employees of the United States. The second is that its purpose was to make certain that such federally employed seamen are not to be regarded as employees of the United States for the purposes of the United States Employees Compensation Act, the Civil Service Retirement Act, the Act of March 7, 1942 relating to the pay of certain government employees, or the Act of December 2, 1942 providing benefits for the injury, disability, death or detention of employees of contractors of the United States. Instead the [fol. 50] act specifically provides that such federally employed seamen shall with respect to the laws administered by the Public Health Service, the Social Security Act, claims for death, injuries, illness, maintenance and cure, loss of

eign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress) or the Act entitled 'An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursement therefor', approved December 2, 1942 (Public Law 784, Seventy-seventh Congress). Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seaman were employed on a privately owned and operated



On June 8, 1942, Admiralty Rule 46 was amended to prevent the possibility of a case being heard which might reveal information of value to the enemy. No concurrable rule or amendment existed on the civil side of the Federal Court.

It was against this background, briefly as we have stated it, that Congress passed the so-called Clarification Act of March 24, 1943, in order to restate, clarify and extend the rights of seamen employed through the War Shipping Administration.

The contention of the plaintiff is that the Act did not change in any way the rights and remedies which these seamen might assert or have against the general agents of the vessels. As a basis for his contention, he relies upon the wording of the Act and *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 66 S. Ct. 1218, and *Aird v. Weyerhaeuser Steamship Company*, 3 Cir., — F. (2) —, (decided September 16, 1947). It is true that the Act does not expressly say that the seamen in question can not bring their actions against the general agents upon the existence or occurrence of the circumstances (which we shall for convenience call rights) listed under clauses (2) and (3) of section 1 (a). However, it seems that the Act, taken as a whole, in connection with its background and the reports of the Senate and House, expresses a clear command by Congress that the enforcement of the various substantive rights of the seamen in question is to be remitted to the new remedy,<sup>3</sup> set forth therein, namely, by first presenting

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3. H. Rep. No. 2572, 77th Cong., 2nd Sess., states: "Under clause 2 of section 1(a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for seasons set forth in the letter of the Attorney General (September 14, 1942). To prevent unnecessary or premature litigation against the United States, it is required that before suit there shall be an administrative disallowance of the same in accord with rules

the claim to the War Shipping Administration in accordance with the rules and regulations prescribed by it; and then after the claim has been administratively disallowed, by bringing suit on the claim pursuant to the provisions of the Suits in Admiralty Act. Merely because Congress stated that with respect to those rights listed in clauses (2) and (3) of section 1 (a) the seamen employed by the War Shipping Administration shall "have all the rights, benefits, exemptions, privileges and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels," it does not follow that Congress meant that they shall have the same remedies. Congress was not haphazard, but careful in the use of terms. The omission of the word "remedies" was not accidental but intentional. Section 4 of the Act is not an indication that Congress intended that these rights could be enforced against the general agent as heretofore side by side with the new remedy. That section, in part, was intended only to afford the general agent limited protection in the event of the arising of a situation similar to that which arose in *Brady v. Roosevelt S. S. Co.*, *supra*. If the interpretation placed upon the Clarification Act by the plaintiff was in fact the intention of Congress, passage of the Act, it seems would have been a vain gesture and completely unnecessary. A cause of

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or regulations to be prescribed by the Administrator, War Shipping Administration."

S. Rep. No. 62, 78th Cong., states: "Section 1 would provide that officers and crew members who are employed on behalf of the United States through the War Shipping Administration on the same basis as seamen in private employment with respect to rights, benefits, and privileges in connection with employment, particularly in case of death, injury or other casualty. Under the bill, these employees of the War Shipping Administration will have the seamen's right to wages, maintenance, and cure, in case of illness or injury in the ships service. They will have the benefits of the Public Health Service, including marine hospitals, like other seamen. They will have old-age and survivors insurance under the Social Security Act. They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they (and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. Such seamen will have the right to enforce claims for these benefits according to the procedure of Suits in Admiralty Act. . . ."

effects, detention, repatriation, collection of wages and bonus, and making of allotments have all of the rights, benefits, exemptions, privileges, and liabilities under law applicable to American seamen employed on privately owned and operated vessels. In other words, the purpose of the act was to provide that seamen, even though they are federal employees, should not in these respects have the normal rights, benefits and privileges of federal employees but should have instead the rights, benefits and privileges of privately employed seamen.

Having thus defined the rights and privileges of federally

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American vessel. Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms 'War Shipping Administration' and 'Administrator, War Shipping Administration' shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term 'seaman' shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States."



employed seamen as being those of seamen privately employed the act goes on to provide that with respect to such claims for injuries, maintenance and cure, loss of effects and collection of wages and bonuses, inter alia, the seamen's rights, if administratively disallowed, shall be enforced pursuant to the provisions of the Suits in Admiralty Act, which means by suit in admiralty in personam against the United States. The federally employed seaman is to be entitled to enforce his rights in this way even though the vessel on which he is employed is technically a public vessel of the United States rather than a government merchant vessel or tugboat in which case under the strict terms of the Suits in Admiralty Act<sup>3</sup> a suit would not lie against the United States with respect to the seaman's claim.

We think that it was the intent of Congress, when by the Clarification Act it gave to federally employed seamen the rights of private seamen, to restrict the enforcement of the [fol. 51] rights thus given to the suit in personam in admiralty against the United States which the Suits in Admiralty Act authorizes. The seamen's rights were to be measured by those of seamen employed by private ship owners rather than by those of other employees in the government service. But since by hypothesis the seamen in question were in fact employees of the United States and not of private ship owners the rights which were thus given them must necessarily be enforced against their employer, the United States. In reaching this conclusion we are fortified by the legislative history of the act.<sup>4</sup>

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<sup>3</sup> Section 2 of the Suits in Admiralty Act reads in part as follows: "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation, mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel, or is a tugboat operated by such corporation." 46 U. S. C. § 742.

<sup>4</sup> The Committee on the Merchant Marine and Fisheries of the House of Representatives in reporting the bill H. R. 7424, which upon reintroduction in the 78th Congress as H. R. 133 became the Clarification Act, discussed in its re-

action which arose prior to the passage of the Act is not before us. Clearly the retroactive provision of the Act gives the seamen in question an election to sue under its provisions or to pursue his former remedies. There is no election provision for the prospective operation of the Act and we are not permitted to read such a provision into it in view of the Act's mandatory language.

The *Hust* case held that while the government may be technically the employer of a seaman, under the temporary conditions then existing the common-law principle of employer-employee relationship need not obtain in order for the seaman to recover against the private operator "agent", under the Jones Act and that the mere transfer of vessels from private ownership to government control did not deprive the seaman of any of the settled rights which he had prior thereto. Although there are some statements made in that case which might be relied on as supporting the plaintiff's contention in this case, inasmuch as the Supreme Court has expressly stated that it was limiting its discussion to the Act's retroactive provision and was refraining from making any determination as to the Act's prospective operation, we do not feel free to rely on those statements as governing in anywise the issues in this case.

It has been brought to our attention that a petition for rehearing has been filed with the Circuit Court of Appeals for the Third Circuit in the *Aird* Case. Until the Circuit Court makes a final disposition of that petition, we shall make no further comment on that case.

Accordingly, this Court's Opinion filed November 26, 1947 is affirmed in accordance with the order of December 29, 1947.

[fol. 52] This, of course, is not to say that federally employed seamen may never have the right to sue anyone other than the United States upon a cause of action growing out of their employment. For if the United States should em-

port (H. Rep. 2572, 77th Cong. 2d Sess.) the problem arising out of the employment of seamen by the War Shipping Administration on vessels "owned by or bareboat-chartered to it." The Committee said (p. 8):

"Because of the fact that seamen employed directly by the War Shipping Administration on vessels owned by or bareboat-chartered to it have the status of government employees the Administrator has not been able under existing law to carry out entirely his intended policy of maintaining the peacetime status of seamen in so far as seamen's rights to compensation for injuries, and so forth, wage credits toward social security benefits and various other benefits which seamen have enjoyed and to which they are entitled. The purpose of section 1 of the bill is to correct the situation so as to permit the complete extension into this area of the basic policy of maintaining the private status of merchant seamen for the duration of the war. Section 1 deals with the rights and benefits of seamen who are government employees by virtue of employment through agents of the War Shipping Administration."

The Committee report continued (pp. 12-14):

"A seaman who falls ill or is injured in the service of the ship has, as an incident to his employment and without regard to fault, the right to receive from the shipowner wages and maintenance and cure. The ill or injured seaman gets wages as if he had completed the voyage, and he receives food and lodging (or an equivalent monetary allowance) and treatment at a United States marine hospital . . .

"All of these rights for which court action lies, although maritime in nature, may be enforced either in Federal or State courts. The suits may be brought in admiralty if the seaman so desires, and may then be in rem. No jury is had in admiralty proceedings. ○



**JUDGMENT.**

Before GANEY, J.

AND Now, to wit: November 26th, 1947, in accordance with the opinion of the Court, it is ORDERED that the above action be and the same is hereby dismissed without prejudice, with costs to defendant.

By THE COURT:

Attest: .

GILBERT W. LUDWIG,  
*Deputy Clerk.*

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**ORDER.**

AND Now, December 29, 1947, after rehearing and consideration of briefs, the conclusion reached in the Court's opinion of November 26, 1947, dismissing the action without prejudice to the plaintiff is confirmed in conformity with a supplemental opinion subsequently to be filed.

/s/ J. CULLEN GANEY, J.

[fols. 32-33] IN UNITED STATES CIRCUIT COURT OF APPEALS,  
THIRD CIRCUIT

No. 9580

ISAAC GAYNOR, Appellant,

vs.

AGWILINES, INC.

**APPENDIX TO BRIEF FOR APPELLEE**

[fol. 34]

**COMPLAINT**

Plaintiff, Isaac Gaynor, claims of Agwilines, Inc., defendant, the sum of Fifteen thousand (\$15,000.00) dollars, with lawful interest thereon, upon a cause of action whereof the following is a true statement:

(1) Plaintiff, Isaac Gaynor, at all times mentioned herein, was a seaman in the United States Merchant Marine.

(2) Defendant, Gwilines, Inc., is and at all times mentioned herein was, a corporation duly organized and existing under and by virtue of the laws of the State of Maine.

(3) Plaintiff, upon information and belief, avers that at all times hereinafter mentioned, defendant possessed, owned, operated and controlled the Steamship "Christopher Gadsden" engaged in coastwise, intercoastal and foreign commerce.

(4) On or about the 25th day of December, 1945, and at all times mentioned herein, plaintiff entered into shipping articles with defendant as a member of the crew of the Steamship "Christopher Gadsden" in the capacity of utility man at the rate of \$132.50 per month plus 100% bonus, plus overtime and found, on a foreign voyage from Philadelphia, Pennsylvania, to undisclosed ports anywhere in the world and return, for a period of twelve months.

(5) On or about the 25th day of December, 1945, at or about 6:30 P. M. o'clock, and while the S/S "Christopher Gadsden" was in navigable waters in the port of Charleston, South Carolina, plaintiff, while in the service of the vessel, was ashore on leave and while a passenger on a bus proceeding from Charleston, South Carolina, to Walter-

[fol. 35] boro, South Carolina, he sustained certain injuries which are hereafter more fully set forth by reason of a collision between the said bus and another motor vehicle.

(6) As a result of the collision aforesaid, plaintiff was then and there generally wounded and injured; his ribs were fractured; he sustained injuries to his chest and lungs; his back and spine were wrenched and sprained; his right leg, knee and ankle and the ligaments attached thereto were severely wrenched, bruised, fractured and otherwise injured; he sustained a compound comminuted fracture of the distal end of the right tibia and fibula; he sustained a shock to his nervous system; he has suffered excruciating and agonizing aches, pains and mental anguish; he has been unable to assume his usual duties and occupation for a long period of time in the past, and upon information, believes and therefore avers that his injuries have become aggravated and that he will be disabled from performing his usual occupations and duties in the future; he has in the past and will in the future be compelled to expend large sums of money for medical care and treatment.

(7) During the entire period plaintiff was employed, he well and truly performed all his duties and was obedient to all lawful commands of the Master and other officers of said vessel.

(8) Plaintiff, by virtue of his service upon the vessel, claims wages for the unexpired period of the shipping articles.

#### Second Cause of Action

Plaintiff re-alleges all the facts set forth in the first cause of action, and in addition thereto, respectfully represents, shows and alleges:

(9) Plaintiff, by virtue of his service upon the vessel, claims maintenance and cure for the period of his disability in an amount which to your Honorable Court shall seem just and proper upon the trial of this cause.

#### Third Cause of Action

Plaintiff re-alleges all the facts set forth in the first and second cause of action, and in addition thereto, respectfully represents, shows and alleges:



(10) At the time plaintiff left the said vessel, namely on December 24th, 1945, he left on board his clothing, baggage and personal effects, to the value of \$311.15, none of which have been returned to him.

(11) Plaintiff has made demand upon the defendant for the return of said clothing, baggage and personal effects, but respondent has failed and neglected to return the same.

(12) By reason of the premises, plaintiff makes claim for the value of said clothing, baggage and personal effects in the sum of \$311.15.

All and singular the premises are true and within the admiralty and jurisdiction of the United States and of this Honorable Court.

Wherefore, Isaac Gaynor claims the sum of Fifteen thousand (\$15,000.00) dollars and brings this action to recover same from defendant.

Freedman, Landy and Lorry, by (S.) Abraham E. Freedman.

[fol. 37]

#### ANSWER

The Answer of Agwilines, Inc., to the summons and complaint of Isaac Gaynor upon an alleged cause of action wherein the sum of Fifteen Thousand Dollars (\$15,000.00) with interest is claimed, which claim is hereby denied, respectfully represents, upon information and belief, as follows:

1. Denied. Defendant denies that it has knowledge or information sufficient to form a belief regarding the status of claimant at the time of filing the within action, but admits that claimant was a seaman and a member of the crew of a vessel of United States registry during his service on Board the Steamship "Christopher Gadsden."

2. Admitted. Defendant admits the allegations of the second paragraph of the Complaint for the purposes of this Answer only.

3. Denied. Defendant denies the allegations of the third paragraph of the Complaint, except that it admits that the Steamship "Christopher Gadsden" was serviced by it as Agent for United States of America, acting by and through

the Administrator, War Shipping Administration, an agency of the United States Government, the owner pro hac vice of said vessel, pursuant to the terms of a General Agency Agreement in the form found in volume 7, 189 of Federal Register (September 25, 1942), page 7562.

4. Denied. Defendant denies the accuracy of the statements of conclusions set forth in the fourth paragraph of the Complaint regarding complainant's employment on board the Steamship "Christopher Gadsden." Defendant avers that complainant was on board the said vessel pursuant to the terms of a written contract embodied in the Shipping Articles of said vessel, and not otherwise. Said contract is a matter of public record in the office of the [fol. 38] United States Shipping Commissioner and available to the complainant.

5. Denied. Defendant denies the allegations of the fifth paragraph of the Complaint, except that it admits that it has been informed that complainant was ashore on leave and while a passenger on a bus proceeding from Charleston, South Carolina, to Waterloo, South Carolina, said bus was in collision with another motor vehicle and as a result of said collision complainant sustained certain personal injuries. Defendant demands strict proof of the allegations of the fifth paragraph of the Complaint, if said allegations be material, at the trial of the cause.

6. Denied. Defendant denies the allegations of the sixth paragraph of the Complaint as set forth therein and avers that the extent and consequences of the said injuries have been grossly exaggerated. Defendant demands strict proof of the allegations of the sixth paragraph of the Complaint, if said allegations be material, at the trial of the cause.

7. Denied. Defendant denies the allegations of the seventh paragraph of the Complaint as statements of conclusions which Defendant is not required to answer.

8. Denied. Defendant denies that complainant is entitled to recover for maintenance and cure from the Defendant herein.

Answering the second cause of action, Defendant reiterates and realleges the foregoing denials and averments of

this answer, and, in addition thereto, respectfully represents, upon information and belief, as follows:

9. Denied. Defendant denies that complainant is entitled to recover maintenance and cure from the Defendant herein.

Answering the third cause of action, Defendant reiterates and realleges the foregoing denials and averments [fol. 39] of this answer, and, in addition thereto, respectfully represents, upon information and belief, as follows:

10. Denied. Defendant denies the allegations of the tenth paragraph of the Complaint, except that it admits that if complainant proves to the satisfaction of your Honorable Court that certain clothing, baggage and personal effects were left by him aboard said vessel and were not returned, that he is entitled to an award in such an amount as your Honorable Court may deem proper for the value of said articles duly proven to have been lost in the manner aforesaid.

11. Admitted. Defendant admits that complainant has made demand for the return of certain clothing, baggage and personal effects but avers that up to the time of filing this Answer it has been unable to locate said personal effects; but if any of said clothing, baggage and/or personal effects belonging to the complainant are located between the date of filing this Answer and the date of trial, the same will be returned to the complainant.

12. Denied. Defendant denies that the value of the clothing, baggage and personal effects alleged to have been lost by complainant was the sum of Three Hundred and Eleven Dollars and Fifteen Cents (\$311.15). Defendant demands strict proof of the value of said articles, to wit, clothing, baggage and personal effects, if same be material, at the trial of the cause.

Defendant denies that all and singular the premises are true, but admits only the Admiralty jurisdiction of the United States and of this Honorable Court, and avers that this Honorable Court does not have jurisdiction of the premises set forth in the Complaint in a Civil Action.

Defendant reiterates and realleges the foregoing denials and averments of this Answer, and, as a full, complete and



affirmative defense to the premises of the Complaint, respectfully alleges, upon information and belief, as follows:

[fol. 40] 13. The Steamship "Christopher Gadsden" was at all times pertinent to the action herein, owned, operated and controlled by the United States of America, acting by and through the Administrator, War Shipping Administration, an agency of the United States Government. Defendant, Agwilines, Inc., acted only as Agent with respect to the said Steamship "Christopher Gadsden", pursuant to the general terms of a standard form of written contract, known as a "General Agency Agreement", between the United States of America, acting by and through the Administrator, War Shipping Administration, and Agwilines, Inc., referred to above. Defendant denies that it owned, operated, or controlled the Steamship "Christopher Gadsden", and avers with reference to said vessel that it acted only as Agent, and denies that it breached any of its duties as Agent; and it further denies that it was the employer of the complainant herein, or any of the officers or members of the crew of said vessel.

Defendant reiterates and realleges the foregoing denials and averments of this Answer, and, as a full, complete and affirmative defense to the premises of the Complaint, respectfully alleges, upon information and belief, as follows:

14. Complainant has failed to comply with the provisions of Public Law 17, 78th Congress (Omnibus Bill—H. R. 133) of March 24th, 1943; Title 50 U. S. C. A., Appendix § 1291. The said Act of Congress and the rules and regulations issued pursuant to the authority of said Act by War Shipping Administration, particularly General Order No. 32, provides, inter alia, that action with respect to claims of the nature asserted in the Complaint herein must be brought pursuant to the Suits in Admiralty Act. Defendant avers, therefore, that complainant has no right to maintain the within Civil Action, and that this Honorable Court lacks jurisdiction in the Civil Action herein by reason of the provisions of Public Law 17 Supra.

[fol. 41] Defendant reiterates and realleges the foregoing denials and averments of this Answer, and, as a full, complete and affirmative defense to the premises of the Com-

plaint, respectfully alleges, upon information and belief, as follows:

15. Any injury which complainant may have sustained while in the service of the Steamship "Christopher Gadsden" was caused solely by his own fault, carelessness and negligence, and/or the fault, carelessness and negligence of a person or persons unknown to Defendant herein, for whom Defendant herein had no responsibility whatsoever, and not by reason of any fault, carelessness or negligence of the Master, Officers or crew of said vessel, nor by reason of any unseaworthiness or unsafe condition of the said vessel, or of her equipment, apparel or tackle.

Wherefore, Defendant denies that complainant is entitled to recover the sum of Fifteen Thousand Dollars (\$15,000.00), or any other sum whatsoever by reason of the premises set forth in the Complaint, and prays that the Complaint herein be dismissed, with costs assessed against complainant.

Krusen, Evans & Shaw, By Rowland C. Evans, Jr.

[fol. 42] EXCERPTS FROM EXHIBIT "A" (SHIPPING ARTICLES)

"United States Coast Guard  
SHIPPING ARTICLES

'It is also agreed that the Master, Officers, and all other Members of the Crew are employees of the United States subject to the provisions of Public Law No. 17 of the 78th Congress, as amended, and are not employees of AGWILINES, INC., that all decisions, amendments, and attachments of the Maritime War Emergency Board shall apply to and become a part of this agreement.'

[fol. 53] ploy a private person as its agent to operate a government vessel and in the course of the operation of the vessel by the agent a tort should be committed he might

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“Under section 1 officers and members of crews employed in vessels by or on behalf of the United States through the War Shipping Administration are for the purpose of determination of the rights and benefits of such seamen and their dependents or beneficiaries referred to those provisions of statutory and general maritime law which are applicable to seamen in private employment.

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“The various rights and remedies under statute and general maritime law with respect to death, injury, illness and other casualty to seamen, have been . . . fully set forth . . . Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942). The provision of the Suits in Admiralty Act that suit lies thereunder only if the ship involved is employed as a merchant vessel or a tugboat is waived for the purposes of section 1 so that the claim may be enforced regardless of the nature of the vessel on which the seaman is serving as an employee of the War Shipping Administration. To prevent unnecessary or premature litigation against the United States, it is required that before suit there shall be an administrative disallowance of the same in accord with rules and regulations to be prescribed by the Administrator, War Shipping Administration.

“Other claims under clauses 2 and 3, such as claims for maintenance and cure, collection of wages and



well be liable in damages to those injured thereby.<sup>5</sup> Likewise if such an operating agent should employ seamen on the vessel being operated by him under shipping articles which indicated that he was operating owner of the vessel

bonuses, and making of allotments, shall also be enforced under the Suits in Admiralty Act."

In the report of the Senate Committee on Commerce upon the bill (S. Rep. 1813, 77th Cong. 2d Sess.) it was said (p. 6):

"The substantive rights under statute and general maritime law with respect to death, injury, or other casualty to seamen employed by the War Shipping Administration would, under section 1, be controlled by the existing law relating to privately employed seamen. The only modification thereof is that the rights shall be enforced in accordance with the provisions of the Suits in Admiralty Act. Other claims, such as claims for maintenance and cure, collection of wages and bonuses, and making of allotments, would also be enforced under that act."

H. R. 7424 did not pass in the 77th Congress and was reintroduced in the 78th Congress as H. R. 133. In reporting the latter bill the House Committee in its report (H. Rep. 107, 78th Cong. 1st Sess.) said (p. 2):

"Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act . . ."

Likewise the Senate Committee in its report (S. Rep. 62, 78th Cong. 1st Sess.) stated (p. 11):

"Under the bill, these employees of the War Shipping Administration will have the seaman's right to wages, maintenance and cure . . . They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they (and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act . . ."

<sup>5</sup> Brady v. Roosevelt S. S. Co., 317 U. S. 575 (1943).

and did not disclose that he was acting for the United States; he might well be liable to the seamen for wages and maintenance and cure.<sup>6</sup> But such claims as these would not be based upon the rights conferred on the seamen by the Clarification Act but rather upon rights which the seamen would have had even if the Clarification Act had never been passed. It follows that unless the plaintiff can establish that wholly independent of the Clarification Act he has an enforceable right against the defendant for wages and maintenance and cure and for the loss of his effects the district court was right in holding that by virtue of the Clarification Act the plaintiff's sole remedy was his suit in admiralty against the United States. This brings us, therefore, to consider whether by virtue of the relationship between the parties independent of the Clarification Act the plaintiff did have such an enforceable right against the defendant.

In *Aird v. Weyerhaeuser Steamship Company*, F. 2d , decided this day, a case involving a claim by a seaman for wages against a general agent of the United States employed under the same standard wartime form of general agency service agreement, this court held that the general agent was not liable to a seaman for his wages where the fact that the United States was owner of the vessel was disclosed on the face of the shipping articles which the seaman signed. In the present case the shipping articles which the plaintiff signed contained the following statement endorsed thereon:

[fol. 54] "It is also agreed that the Master, Officers and all other Members of the Crew, are employees of the United States subject to the provisions of Public Law No. 17 of the 78th Congress, as amended, and are not employees of Agwilines, Inc., that all decisions, amendments, and attachments of the Maritime War Emergency Board shall apply to and become a part of this agreement."

The articles also contained a specific reference to "Agwilines, Inc., as gen. agts. for W S A."

As we pointed out in the *Aird* case the obligation for the payment of wages arises out of the contract of employment,

<sup>6</sup> Compare *Shilman v. United States*, 164 F. 2d 649 (CCA 2, 1947), cert. den. U. S.

the shipping articles, between the seamen and the master, the latter therein representing the ship and its owners. The same is true of the obligation to provide maintenance and cure for an injured seaman.<sup>7</sup> For the reasons stated in our opinion in the Aird case we hold that the plaintiff may not assert a claim for wages or maintenance and cure against the defendant.

This leaves for consideration the plaintiff's claim against the defendant for loss of his effects. Such a claim is not contractual in nature but rather sounds in tort.<sup>8</sup> It is, therefore, maintainable against the defendant only if the latter can be held responsible under the doctrine of respondeat superior for the acts of those individuals who were actually responsible for the plaintiff's loss of his effects. Assuming that the persons responsible for the loss of his effects were the master and members of the crew the plaintiff argues that *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575 (1943) and *Hust v. Moore-McCormack Lines*, 328 U. S. 707 (1946), are authority for the proposition that the defendant is liable to him for their tort. We do not agree.

In the *Brady* case it appeared that the defendant was an operating agent employed by the United States Maritime [fol. 55] Commission to operate a government vessel in peacetime. As operating agent in possession of the vessel the Supreme Court held that it would be answerable to a third person for a maritime tort committed on board. The agency contract involved in the *Brady* case was, however, quite different from the standard wartime general agency service agreement involved in the case now before us. There the defendant was specifically empowered to operate the vessel while here the obligation of the defendant is only to manage the vessel's business and the full control, responsibility and authority with respect to the navigation and management of the vessel itself is by the general agency service agreement specifically entrusted to the master as agent and employee of the United States. There are many

<sup>7</sup> *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 371 (1932); *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 730 (1943).

<sup>8</sup> *Hutchinson v. Coombs*, Fed. Cas. No. 6955 (D. C. Me. 1825); *The Washington*, 296 F. 158, 167 (D. C. N. Y. 1924).



cogent reasons why, although the Government may have been willing in peacetime to put its vessels into the possession of an agent, it should insist that in wartime it must itself retain full possession and complete control of the navigation of its vessels through its own masters and crews. Some of these reasons are referred to in *Caldarola v. Eckert*, 332 U. S. 155, 159 (1947). Suffice it to say that under the form of agreement involved in the present case the defendant did not become operating agent of the vessel or owner pro hac vice so as to become liable for torts committed on board by the master or members of the crew. On the contrary, as we have pointed out in the *Aird* case, the responsibility of the defendant under the agreement was merely that of shoreside agent or ship's husband.

But, says the plaintiff, in *Hust v. Moore-McCormack Lines*, 328 U. S. 707 (1946), a general agent for a government vessel acting under the form of general agency service agreement involved in this case was held liable to a seaman in an action under the Jones Act. So much must be admitted. Nonetheless the *Hust* case is not controlling here. It is true that the opinion of the four justices who constituted the majority of the seven-judge court which sat in that case described the defendant as an operating agent and held that as such it was the "employer" of the injured [fol. 56] plaintiff within the meaning of the Jones Act. But in *Caldarola v. Eckert*, 332 U. S. 155 (1947), decided at the next term, five justices of the Supreme Court (including among them the three who dissented in the *Hust* case) held, against the vigorous dissent of the four justices who had formed the majority in the *Hust* case, that the wartime standard form of general agency service agreement employed by the War Shipping Administration and with which we are here concerned did not make the government's general agent the owner pro hac vice of a vessel assigned to it so as to make it liable to a third party, in that case a longshoreman, for a maritime tort committed on the vessel. It thus appears that on the question now under discussion, namely, whether a general agent under the standard form of general agency service agreement is an operating agent in possession of the government vessel assigned to it and, therefore, responsible for maritime torts committed thereon by members of the crew, the *Caldarola* case compels a negative answer. To the extent that the *Hust* case was authority

to the contrary it must, therefore, be regarded as overruled by the *Caldarola* case.<sup>9</sup>

We conclude, therefore, that the defendant may not be held liable to the plaintiff for the loss of his effects if that loss resulted from the conduct of the master or members of the crew of the *Christopher Gadsden*. There is, of course, the possibility that the plaintiff's effects were delivered by the master to the defendant's shoreside employees, not themselves employees of the United States, and wrongfully lost or withheld from the plaintiff by the latter. In such case the defendant might well be liable to the plaintiff for the conduct of its employees resulting in the loss [fol. 57] of his effects. The difficulty with this proposition in the present case, however, is that the plaintiff failed to prove any such facts or, indeed, any facts from which such facts might be inferred. On the contrary the stipulation of facts upon which he submitted his case merely states that he left his effects on board the *Christopher Gadsden* when he left her on December 24, 1945, that he has demanded their return and that defendant has been unable to locate them and has failed to account for them or compensate him for their loss. In the absence of evidence that employees of the defendant ever had possession of the plaintiff's effects these stipulated facts are clearly insufficient to fasten liability upon the defendant. Moreover even if the somewhat ambiguous language of the defendant's answer to the allegations of the complaint with respect to the loss of the plaintiff's effects may be construed as an admission of liability it is quite clear that it does not constitute an ad-

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<sup>9</sup> In *Caldarola v. Eckert*, 332 U. S. 155, 159 (1947) the court, speaking of the *Hust* case, said:

"We there held that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer.' The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States."

mission as to the identity or value of the lost effects. Accordingly since neither the identity<sup>10</sup> nor value of the effects was stipulated by the parties and no evidence on the subject was offered by the plaintiff the court did not err in dismissing the complaint as to this cause of action.

The judgment and order of the district court will be affirmed.

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#### CONCURRING OPINION

Biggs, Circuit Judge, concurring:

For the reasons stated in my concurring opinion in *Aird v. Weyerhaeuser*, No. 9294, I concur in the result reached by this court.

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[fol. 58] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9580

ISAAC GAYNOR, Appellant,

v.

AGWILINES, INC.

Present: Biggs, Maris, Goodrich, McLaughlin and O'Connell, Circuit Judges.

JUDGMENT—Filed August 4, 1948

On Appeal from the District Court of the United States, for  
the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

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<sup>10</sup> The statement contained in the stipulation of facts filed by the parties that "Plaintiff contends that the various items of personal effects are hereafter set forth in Exhibit 'F'" is no more than a stipulation of the fact of plaintiff's contention. It clearly is not an agreement by the defendant that the items were in fact as set forth in the exhibit.



On consideration whereof, it is now here ordered and adjudged by this Court that the judgment and order of the said District Court in this case be, and the same is hereby affirmed with costs.

By the Court, Maris, United States Circuit Judge.

August 4, 1948.

[File endorsement omitted.]

[fol. 59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 162, Misc. —

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR CERTIORARI AND TRANSFERRING CASE TO APPELLATE DOCKET—November 22, 1948

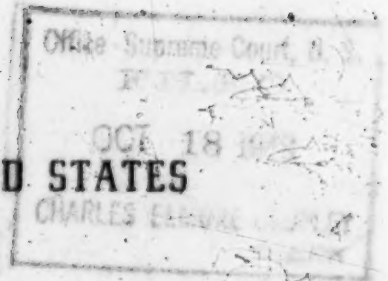
On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 430. The case is placed on the summary docket and assigned for argument immediately following No. 360.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to the writ of certiorari.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948



**No. 360**

**FRED W. FINK,**

*Petitioner and Plaintiff-Respondent below,*

*vs.*

**SHEPARD STEAMSHIP COMPANY, A CORPORATION,**

*Respondent and Defendant-Appellant below*

**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF OREGON**

✓ **B. A. GREEN,**

*1003 Corbett Building,*

*Portland, Oregon;*

✓ **EDWIN D. HICKS,**

*712 Failing Building,*

*Portland, Oregon;*

**THOMAS H. TONGUE, III,**

*712 Failing Building,*

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1948**

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**No. 360**

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**FRED W. FINK,**

*Petitioner and Plaintiff-Respondent below,*

*vs.*

**SHEPARD STEAMSHIP COMPANY, A CORPORATION,**

*Respondent and Defendant-Appellant below*

---

**PETITION FOR WRIT OF CERTIORARI**

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*To the Honorable Chief Justice and Associate Justices of  
the Supreme Court of the United States:*

Your petitioner, Fred W. Fink, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the State of Oregon.

**Statement of the Matter Involved**

This case involves an action by a seaman under the Jones Act (46 U. S. C. 688; 38 Stat. 1185; 41 Stat. 1007) against a steamship company for injuries received due to the negligent operation of a ship operated under a standard general agency agreement between the War Shipping Administra-

tion and the steamship company (Plf. Ex. 4; R. 106, 58). The case is identical with the case of *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, except that the injuries in this case were received *after* the effective date of the Clarification Act, also known as Public Law 17 (50 U. S. C. 1291, 57 Stat. 45), while the injuries in the *Hust* case were received *prior* to the effective date of that Act.

On June 8, 1943, petitioner shipped out as an able-bodied seaman on the Liberty ship S. S. George Davidson, after signing the usual shipping articles (Def. Ex. F, R. 109, 211). As usual, the crew for the ship had been furnished by a Union through its hiring hall (R. 87), and there were in effect Union agreements between the steamship company and various Unions (Plf. Ex. 1, 5, 9 and 10, R. 87, 98, 106, 135, 136 and 240). Despite the general agency agreement under which the vessel was operated, these Union agreements continued in effect and the steamship company and Unions continued to negotiate for the settlement of disputes (R. 89, 90, 98).

At about 7:30 P. M., on August 2, 1943, while said vessel was at sea two days out of the port of Hobart, Tasmania, plaintiff was ordered by the boatswain on said vessel to dump overboard the contents of several garbage cans. Other seamen were then and there available to assist in said task, but were not ordered to do so. The ship's garbage was disposed of by lifting it over the rail of the ship and dumping it overboard. The garbage can in question weighed in excess of 150 pounds and was large and bulky in size, and there was a heavy sea running at the time and the deck was wet and the ship was rolling and pitching heavily. As plaintiff was lifting said can, a sea rolled the ship and threw him off balance and threw the can back against him and his back gave way, causing the injuries complained of (R. 178, 179).

In defense, respondent steamship company denied that it



was engaged in the operation of the vessel, that it was the employer of the petitioner, and that petitioner had the right to file this action under the Jones Act in a State Court. (Answer, par. I, II and VI, R. 3, 4). Respondent also denied any negligence (Answer, par. VII, R. 4).

By stipulation of the parties, the issue of whether plaintiff had the right to sue defendant under the Jones Act was tried before the Court, sitting without a jury, in advance of submitting to the jury the evidence on the question of negligence (R. 84). The trial Judge then rendered an opinion sustaining plaintiff's right to pursue this remedy (R. 173). The case was then submitted to the jury on the question of negligence, resulting in a verdict and judgment for plaintiff in the amount of \$9,000.00 (R. 5; 6). It has now been stipulated that there was sufficient evidence of damages and extent of injuries to sustain this verdict (R. 187).

On appeal by the respondent herein, the Supreme Court of the State of Oregon reversed this verdict and judgment (R. 10; 32). In reaching this conclusion it was held that although this Court had established in the *Hust* case that the crew of such a vessel were employees of the steamship company operating it under a general agency agreement (R. 14), the provisions of the Clarification Act must be construed as indicating an intention of Congress to treat such seamen as employees of the United States after the effective date of that Act, at least for the purpose of destroying the right of such seamen to bring actions under the Jones Act against the steamship companies (R. 27, 28).

Judgment was entered by the Supreme Court of the State of Oregon, based upon the above mentioned opinion, on April 6, 1948, (R. 35). A petition for rehearing was then filed (R. 35), and on May 18, 1948, the Supreme Court of the State of Oregon entered an order denying the petition for a rehearing (R. 41). On August 9, 1948, an order was entered herein extending the time within which to file the

petition for writ of certiorari to and including September 20, 1948 (R. 239). On September 16, 1948, a further extension was entered herein to and including October 18, 1948 (R. 239).

### **Statement on Jurisdiction**

#### **1. *Statement of Federal Rights Relied Upon.***

The grounds upon which it is claimed that a federal question is involved in this case are that your petitioner has from the institution of this case sought to specially claim and enforce a right or privilege under a statute of the United States, within the meaning of Section 237(b) of the Judicial Code, as amended, (28 U. S. C. 244(b)), and, in addition, that respondent has from the institution of this case sought to specially set up and claim a right, privilege or immunity under a statute of and also under a commission held and/or authority exercised under the United States, within the meaning of said Section 237(b).

As already stated, this case is an action by a seaman relying upon the rights and privileges provided under the Jones Act (46 U. S. C. 688, 38 Stat. 1185; 41 Stat. 1007), which provides that:

“Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; . . .”

As also stated above, it has been the defense of respondent herein throughout this case that it has a right, privilege or immunity from suit by virtue of the terms of this same statute and also by virtue of its authority and/or commission as a general agent of the War Shipping Administration

under the provisions of its general agency agreement (Plf. Ex. 4, R. 106, 58).

Additional grounds of jurisdiction result from the fact that both petitioner and respondent sought during the course of the proceedings in the courts of the State of Oregon to confirm the existence of the rights, privileges and immunities respectively claimed by them by reference to the provisions of the Clarification Act, Public Law 17 (50 U.S.C. App. Sec. 1291, 57 Stat. 45), and the Supreme Court of Oregon in its decision endeavored to interpret and construe the provisions of that federal statute. The principal provision of that Act in controversy is as follows:

Section 1(a): "Officers and members of the crews \* \* \* employed on United States \* \* \* vessels as employees of the United States through the War Shipping Administration shall; with respect to \* \* \* (2) \* \* \* injuries \* \* \* or claims arising therefrom \* \* \* have all of the rights \* \* \* under law applicable to citizens of the United States employed as seamen on privately owned and operated vessels."

## 2. Federal Question Properly Raised.

The complaint filed by petitioner in the Circuit Court of the State of Oregon for Multnomah County states specifically that this action is brought under the Jones Act (First Amended Complaint, par. VI, R. 3). This fact was conceded by respondent (Answer, par. VI, R. 4). The Oregon Supreme Court also specifically recognized this fact in its decision (R. 11, 12).

With reference to Public Law 17, supra, while the pleadings make no specific reference to its provisions, the respondent, in its first assignment of error on appeal to the Supreme Court of the State of Oregon, raised the question of whether this action could be maintained because of the provisions of that statute (R. 42). It was also recognized.



by the Oregon Supreme Court in its decision that the defendant had asserted that the effect of the Clarification Act was to foreclose such an action and to remit such injured seaman to a suit against the United States under the Suits in Admiralty Act (46 U.S.C. 742, 41 Stat. 525) in the United States Federal Courts (R. 12). Moreover, the Oregon Supreme Court undertook to construe and interpret the effect of the Clarification Act upon the rights claimed by this petitioner under the Jones Act (R. 32). This determination necessarily involved the consideration of whether this statute created, destroyed or confirmed the existence of rights, privileges and immunities respectively claimed under the Jones Act by the petitioner and respondent in this case, as well as the question of whether Public Law 17 was sufficiently unambiguous to satisfy the rule established by this case in *Brady v. Roosevelt Steamship Co.*, 317 U. S. 575, 581, and in *Hust v. Moore-McCormack Lines, Inc.*, *supra*, at 722, to the effect that long established rights of seamen can only be destroyed by a clear expression of Congressional intent.

The claims by respondent to right, privilege or immunity by virtue of the terms of its general agency agreement with the War Shipping Administration were also not specifically referred to in the pleadings, nor in assignments of error on appeal. We submit, however, that such claims to rights, privileges or immunities were implicit in respondent's answer, denying that it was the employer of petitioner (Answer, par. II, R. 3). This position could, of course, be sustained only by reference to the provisions of the general agency agreement, which, according to defendant, constituted it as nothing more than an agent of the United States and precluded it from responsibility as employer of the seamen engaged pursuant to that agreement. The only question on this point is whether respondent's defense based on this agency agreement was a claim to right, privi-

lege or immunity under a law of or under a commission held and/or authority exercised under the United States, within the meaning of Section 237 (b) of the Judicial Code, *supra*, as discussed below.

### 3. *Authorities Supporting Jurisdiction.*

This Court has frequently found it necessary to review on certiorari the decisions of state courts in cases arising under the Federal Employers Liability Act and the Jones Act, in order to clarify the statutory tests of liability and to the end that these Acts may have uniform application. *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, Sec. 344; *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 244.

It is to be noted that the Oregon Supreme Court not only recognized the existence of the Federal questions in this case (R. 12), but expressly based its decision upon a determination of such questions (R. 32). This determination was based both upon the construction and interpretation of provisions of the Jones Act and also of the provisions of the Clarification Act, adopted by Congress on March 24, 1943 (R. 12, 32).

These facts alone are sufficient to support the jurisdiction of this Court.

The determination by the Oregon Supreme Court was also based upon its construction of the general agency agreement (R. 12, 21), which forms the basis upon which respondent claims immunity.

All contracts with the United States are to be considered and construed in the light of the Federal statutes authorizing and limiting their execution and effect. It has been held by this Court that this principle applies to operating agreements between the United States and private steamship companies. *Brady v. Roosevelt S. S. Co.*, *supra*. It follows that since the general agency agreement in question

would directly affect rights of seamen under the Jones Act, the respondent, by claiming a right or immunity because of the general agency agreement, is also claiming a right, privilege or immunity under the provisions of the Jones Act itself.

It has been recognized that in actions under the Federal Employers Liability Act (45 U.S.C. 51; 35 Stat. 65; 53 Stat. 1404), upon which the Jones Act is based, the protection afforded by its provisions is fully as available to employers, under claim of Federal right or immunity, as are the benefits of its rights available to employees. *St. Louis I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265, 275; *Atchison, T. & S. F. Co., v. Saxon*, 284 U. S. 458, 459. See also *St. Louis, etc., Ry. v. Mills*, 271 U. S. 344.

Moreover, this Court has specifically held that the claim to a right, privilege or immunity by virtue of a contract between the United States and a private corporation may properly be considered as a Federal question within the meaning of the Judicial Code, *U. S. v. Ansonia Brass, etc., Co.*, 218 U. S. 452, 462-3. See also *Yearstey v. W. A. Ross Construction Co.*, 309 U. S. 18; *U. S. v. Pink*, 317 U. S. 203, 217; *Carpenter v. Shaw*, 280 U. S. 363, and *U. S. v. Allegheny County*, 322 U. S. 174, 183.

#### 4. Federal Question Is Substantial.

We submit that this case is not only one "where a state court has decided a Federal question of substance not theretofore determined by this Court", but is also one where a state court has decided such a question "in a way probably not in accordance with applicable decisions by this Court". (Supreme Court Rule 38, par. 5a). In addition, this is a case involving a question upon which one Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter. (Id., par. 5b).



This is clearly a case of first impression, so far as this Court is concerned. In the case of *Hust v. Moore McCormack Lines, Inc.*, *supra*, this Court specifically refrained from passing upon the application of the Clarification Act; *supra*, to cases involving injuries to seamen after the effective date of that Act.

Thus, it was held by this Court in the *Hust* case, at p. 727, as follows:

"We need not determine in this case whether prospectively the Clarification Act affected rights of the seamen against the operating agents and others, or simply made sure that his rights were enforceable against the government. We make no suggestion in that respect. For this case, on the facts, is not governed by the statute's prospective operation."

It was held by this Court in the *Hust* case, however, that seamen employed on ships operated under standard agency agreements with the War Shipping Administration are, for the purposes of the Jones Act, to be considered as employees of the steamship companies engaged as general agents under such agreements (*Id.*, pp. 723-725). This conclusion was later reaffirmed in this Court in the case of *Caldarola v. Eckhart et al.*, 332 U. S. 155, in which it was held, at p. 159, referring to the *Hust* case, that:

"We held there that under the agency contract the agent was the 'employer' of an injured person, as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer'."

It follows that if such seamen are to be considered as employees of such general agents for the purposes of the Jones Act, then they have the right to sue such agents under the Jones Act in state courts, with right to trial by jury, unless the provisions of the Clarification Act de-

stroyed the status of such seamen as employees of such general agents for the purpose of pursuing that remedy.

For reasons hereinafter stated, it is submitted that in adopting the Clarification Act the Congress had no intent and did not effect any change whatever to change the status of seamen employed on ships operated under general agency agreements as employees of the private steamship companies or to destroy their remedies against such general agents under the Jones Act by proceedings in state courts with trial by jury.

Nevertheless, it was held by the Oregon Supreme Court that the effect of the Clarification Act was to treat such seamen as employees of the United States and to destroy the right of such seamen to bring actions under the Jones Act against such general agents in state courts with right of trial by jury (R. 28). Thus, the Oregon Supreme Court has decided a Federal question of importance to thousands of seamen employed on vessels operated under general agency agreements with the War Shipping Administration and which was expressly held open by this Court in its decision in the *Hust* case. In addition, and as hereinafter stated, it is submitted that the Oregon Supreme Court decided this question in a way probably not in accordance with applicable decisions by this Court. In any event, it is clear that this case involves a Federal question requiring analysis of Federal statutes and of decisions of this Court and exposition of the same before a proper decision can be reached. *Robertson and Kirkham, supra*, at p. 97; *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710, 716-717.

In addition, as stated above, one Circuit Court of Appeals has rendered a decision upon the identical question involved in this case in conflict with the decision of another Circuit Court of Appeals on the same matter. Thus, the Circuit

Court of Appeals for the Second Circuit, in *McAllister v. Cosmopolitan Shipping Co., Inc.*, 1918 A. M. C. 1307, held, in an opinion by Justice Augustus N. Hand, that the right of such a seaman to sue the general agent under the Jones Act for injuries suffered subsequent to the effective date of the Clarification Act was not destroyed by that Act. In referring to the *Hust* case, it was held, at p. 1314, as follows:

"The opinion expressly disclaimed any intention of dealing with liability for prospective acts of negligence, but the theory of liability which it adopted seems to be equally applicable to such acts. \*The Clarification Act, however, makes no reference to the liability of a general agent and we cannot see why it should be thought to eliminate such liability, if it existed. Moreover, it is to be noted that the government in its brief as *amicus curiae* makes no claim that the Clarification Act has any bearing on the plaintiff's right of recovery. We believe that the purpose of the Act was to clarify the right against the United States of seamen employed by the War Shipping Administration and not to disturb other rights of seamen against the general agents so far as they existed. The question whether, and how far, such other rights exist is, as we have already said, a matter for determination by the Supreme Court in dealing with the scope of the *Hust* decision.

"Accordingly we must respectfully differ with the opinion of the Supreme Court of Oregon in *Fink v. Shepard S.S. Co.*, 1948 A. M. C. 585, 192 P. (2d) 258, rehearing denied, 1948 A. M. C. 1169, 193 P. (2d) 537, which held that the Clarification Act prevents a suit against the agent. We are, therefore, remitted to the theory which we have already expressed, that the *Hust* decision governs the situation here and that its reasoning, in spite of any limitation in the opinion of the issues directly passed upon, points toward liability of the general agent under the Jones Act in the present case."



On the other hand, the Circuit Court of Appeals for the Third Circuit, in *Gaynor v. Aguilines, Inc.*, 1948 A. M. C. p. 1322, reached a result which may be considered as contrary to the decision in the *McAllister* case, although the decision would appear to be distinguishable upon the ground that the shipping articles provided that the crew were employees of the United States, and upon the further ground that it involved an action to recover wages, maintenance and cure and the value of clothing and personal effects, rather than an action in tort for personal injuries which, under the Jones Act, is available against the employer of the seaman. See also the decision by the same Court in *Aird v. Weyerhaeuser S.S. Co.*, 1948 A. M. C. p. 1315, involving issues similar to those in the *Gaynor* case.

It also appears from the following cases that probably the majority of decisions supports the position of the petitioner and is opposed to the decision appealed from this case:

*McAllister v. Cosmopolitan Shipping Co., Inc.*, *supra*:  
*Warren v. U. S.*, 75 F. Sup. 210; and 76 F. Sup. 735  
 (S. D. N. Y., J. Medina);

*Healey v. Sprague S.S. Co.*, 76 N. Y. S. 2d, 564;

*Guay v. American Presidents Line* (Calif.), 184 P.  
 (2d) 539;

*Miller v. Wessel, DuVall and Co.* (S. D. N. Y.), 1947  
 A. M. C., 429;

*Bennett v. Wilmore S. S. Corp.* (S. D. Tex.), 69 F.  
 Sup. 427;

*Koistinen v. American Export Lines, Inc.*, 1948 A. M. C.  
 1464;

*Cohen v. American Petroleum Transport Corp.*, 1947  
 A. M. C. 336;

*Little v. Moore-McCormack Lines, Inc.*, 1948 A. M. C. 1337;

*Casey v. American Export Lines* (J. Alfred C. Coxe, S. D. N. Y. Dec. 17, 1947), unreported.

The question involved in this case is also one of great public importance. If the decision of the Oregon Supreme Court is correct, thousands of American seamen will be deprived of their rights to bring suits in state courts under the Jones Act, with the guaranty of trial by jury, against the large proportion of steamship companies now operating under standard agency agreements. Even if the only Federal right claimed by this petitioner under the Jones Act were the right to jury trial in a state court, we submit that the loss of this right alone raises a Federal question of substantial importance, since it has been recognized by this Court that the right to jury trial is "part and parcel" of the remedy afforded under the Jones Act and that to deprive workers of the benefit of a jury trial is to take away "a goodly portion of the relief which Congress has afforded them." *Bailey v. Central Vermont Ry.*, 319 U. S. 350. See also *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35. We also submit that there are important reasons of public policy at this time in view of the large number of contracts now outstanding between the Federal government and private corporations and the extreme importance of many of the questions now arising under such contracts to support the position that this Court should exercise its discretion to review by writ of certiorari the decision of any state Supreme Court which undertakes to pass upon the validity of any right or immunity claimed by a private corporation by virtue of the provisions of a contract with the Federal government, particularly where the contract designated the company to be an agent of the government and is a standard

form governing the rights of thousands of seamen engaged on hundreds of ships.

### **The Question Presented**

The ultimate and primary question presented to the Court in this case is whether a seaman employed on a ship operated under the standard form of general agency agreement between the War Shipping Administration and various steamship companies and who was injured subsequent to the effective date of the Clarification Act, *supra*, has a cause of action which he may pursue in a state court under the Jones Act against such a steamship Company as his employer for injuries received due to the negligent operation of the ship.

### **Reasons Relied upon for Allowance of Writ**

In addition to the foregoing statement supporting the jurisdiction of this Court, petitioner submits the following reasons why the Supreme Court of the State of Oregon erred in its decision and why the petition for writ of certiorari in this case should be granted by this Court:

1. This Court, in the case of *Hust v. Moore-McCormack Lines, Inc., supra*, expressly held that seamen employed on ships operated under standard general agency agreements are still employees of the general agents for the purposes of the Jones Act. The decision in the *Hust* case on this point was confirmed by this Court in *Caldarola v. Eckart*, 332 U. S. 155, 159. This result is also in accord with other decisions by this Court: *N. L. R. B. v. Hearst Publications*, 322 U. S. 111; *U. S. v. Silk*; 331 U. S. 704; *Lavender v. Kurn*, 327 U. S. 645. This result is also supported by other evidence in the record of this case, which is identical, for all practical purposes, with the record in the *Hust* case, and which includes Union contracts between the steamship



company and the Unions representing the petitioner, other seamen and employees of such ships, and under which the companies were designated as the employer and retained the right to hire and fire (Plf. Ex. 1, 5, 9, 10 and 12, R. 87, 98, 106, 135, 136, 166 and 240. See also R. 11); evidence that during the War these agreements were expressly continued with the approval of the War Shipping Administration and that steamship companies continued to negotiate grievances and act otherwise as employers of the crew and were recognized as such by the National War Labor Board and National Labor Relations Board (Def. Ex. C, R. 107, R. 188; R. 89, 90 and 98; Plf. Ex. 12 and 13 (R. 166, 240). See also provisions of the general agency agreement, (Plf. Ex. 4, R. 106, 58) including requirements that the crews were still to be procured by the steamship companies in the usual manner, (R. 59) it being held in the *Hust* case (pp. 730 to 733) that such agreements continued the employer and employee relationship between the seamen and such companies.

2. The Oregon Supreme Court held that under the Clarification Act the exclusive remedy of injured seamen employed on vessels owned by the United States and operated under standard general agency agreements and injured after the effective date of that Act is to sue the United States under the Suits in Admiralty Act. It necessarily follows that all of the former rights of such seamen to sue their employers, the steamship companies engaged as general agents under such agreements, in state courts under the Jones Act, with the right of trial by jury, as established by this Court in *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, have been destroyed by implication by virtue of the Clarification Act. In so holding, the Oregon Supreme Court failed to follow the rule established by this Court in *Brady v. Roosevelt Steamship Co.*, *supra*, at 580, 581, and in the *Hust* case, *supra*, at 722, wherein it was held that although "Congress

could authorize so vast a disturbance to settle rights by clear and unequivocal command . . . it is not permissible to find one by implication."

3. Before such a "clear and unequivocal command" and manifestation of Congressional intent can be found to provide an exclusive remedy by such seamen against the United States and to destroy the rights of such seamen against private steamship companies, it must at least be clear that Congress understood that at the time of enacting the Clarification Act and by virtue of the terms of such general agency agreements seamen employed on such vessels had already become employees of the United States, since if Congress understood that such seamen were still employees of the general agents or was in doubt as to whether such seamen were employees of the United States or of the general agents, it would have been necessary to amend or repeal the Jones Act before the rights of such employees to sue their employers, the general agents, could have been destroyed. In the absence of such amendment or repeal, the provisions of the Clarification Act providing that such seamen may bring suit against the United States must be considered as an *additional* remedy, rather than an exclusive remedy, under the rule that rights under the Jones Act cannot be destroyed by implication or otherwise than by "clear and unequivocal command."

4. This Court, in the *Hust* case, has expressly held that Congress was at least uncertain as to the status of such seamen (Op. pp. 730 and 733); that one of the purposes of the Clarification Act was to save seamen's rights and remedies rather than to take them away (Op. pp. 726 and 733); and that the Clarification Act was passed only "to make certain that seamen would have *at least* the remedy provided by the Suits in Admiralty Act (Op. p. 727). These pronouncements by this Court foreclose any holding that

Congress either understood that such seamen had become employees of the United States or that in adopting the Clarification Act Congress expressed any "clear and unequivocal command" to destroy injured seamen's rights under the Jones Act to sue private steamship companies engaged as general agents.

5. The retroactive provisions of the Clarification Act providing for an election of remedies prior to the effective date of that Act, do not indicate an intent to limit seamen after the effective date of the Clarification Act to suits against the United States under the Suits in Admiralty Act, but reveal no more than an intent to clarify and, if necessary, to extend, retroactively, the remedy of seamen under certain circumstances to bring proceedings against the United States under the Suits in Admiralty Act. This is in accord with the "conserving intent of Congress", as held in the *Hust* case (pp. 729; 733). At the least, such retroactive provisions cannot be regarded as a "clear and unequivocal command" to destroy, after the effective date of that Act, the rights of seamen to bring proceedings under the Jones Act against steamship companies engaged as general agents.

6. Likewise, the provisions of the Clarification Act that claims for personal injuries by such seamen "shall" be enforced under the Suits in Admiralty Act was not intended to destroy the rights of such seamen to proceed against such steamship companies under the Jones Act, as held by the Oregon Supreme Court (R. 29), but was intended to provide only that "the claims would be enforceable by suit against the United States only under the Suits in Admiralty Act" (H. R. 2572, p. 29, 77th Congress, 2nd Session). It is thus apparent that this provision was only intended to deal with remedies of seamen against the United States; that it was in that sense alone that the remedy under the



Suits in Admiralty Act was meant to be exclusive, and that it was not intended to deal with any remedies that seamen might have against private steamship companies. Similarly, the decision not to allow a jury trial in such proceedings against the United States does not indicate an intention to prohibit actions against private steamship companies, with attendant jury trials, as held by the Oregon Supreme Court (R. 29). Instead, the decision to exclude jury trials was based upon the ground that jury trials should not be allowed in proceedings against the United States (H. R. 7424, Hearings, p. 33, 77th Congress, 2nd Session). Therefore, the fact that jury trials were not provided for under the Clarification Act in proceedings by seamen against the Government does not indicate a "clear and unequivocal" Congressional intent to destroy the right of seamen to bring actions under the Jones Act against steamship companies engaged as general agents (See also H. R. 2572, *supra*, p. 14).

7. It has been conceded by the attorneys for the very administrative agency of the Government which drafted the Clarification Act and sponsored its passage that this statute, far from having any such far-reaching intent, was limited to rights of such seamen against the Government, did nothing to affect any rights or remedies that they may have had against the general agents, and, therefore, "has no bearing on the present case". (See Op. Oregon Sup. Ct., R. 32. See also excerpt from Brief of the United States as *Amicus Curiae*, Appendix A).

8. Viewed as a whole, the decision of the Oregon Supreme Court represents but another attempt to resurrect the doctrine of the *Lustgarten* case, *Johnson v. Fleet Corp.*, 280 U. S. 320, which limited the remedy of such seamen to proceedings under the Suits in Admiralty Act against the Government—a doctrine first rejected in *Brady v. Roosevelt*

*Steamship Co., supra*, and again rejected in *Hust v. Moore*  
*McCormack Lines, Inc., supra*.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Supreme Court of the State of Oregon, commanding said Court to certify to this Court a complete transcript of the record and of all proceedings of said Supreme Court of the State of Oregon had in said cause, to the end that this cause may be reviewed and determined by this Court, as provided for by statutes of the United States; that judgment of the Supreme Court of the State of Oregon be reversed, and for such further relief as to this Court may seem proper.

Dated October 11, 1948.

B. A. GREEN,  
EDWIN D. HICKS,  
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*Attorneys for Petitioner.*

## APPENDIX A

Excerpt From Page 51 of Brief for the United States  
As Amicus Curiae

### IN THE SUPREME COURT OF THE STATE OF OREGON

SHEPARD STEAMSHIP COMPANY, *Appellant,*

v.

FRED W. FINK, *Respondent*

On Appeal from a Judgment of the Circuit Court for  
Multnomah County, Oregon

Hon. Walter L. Toozé, Judge

**Brief for the United States as Amicus Curiae**

“It is clear that the sole intended effect of the Clarification Act was to remove all impediments to War Shipping Administration seamen's asserting their rights against the United States under the Jones Act and preserving their rights under the Social Security Acts. In return the Act discontinued their rights under the U. S. Employees' Compensation and Civil Service Retirement Acts, saving, however, such claims and clauses of action as had theretofore accrued under those acts. We submit, therefore, that the Clarification Act has no bearing on the present case.”

Respectfully submitted,

H. G. MORISON,  
*Acting Assistant Attorney General,*

HENRY L. HESS,

*United States Attorney,*

J. FRANK STALEY,

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*Special Assistants to the Attorney General, Admiralty and Shipping Section, Department of Justice,*

*Attorneys for the United States.*

January 1948.

(8889)



IN THE  
**Supreme Court of the United States**

October Term, 1948

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No. 360

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FRED W. FINK,

*Petitioner and Plaintiff-Respondent*  
below,

vs.

SHEPARD STEAMSHIP COMPANY,  
a corporation,

*Respondent and Defendant-Appellant*  
below.

---

**PETITIONER'S BRIEF ON THE MERITS**

---

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# I.

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IN THE

# Supreme Court of the United States

October Term, 1948

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No. 360

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© FRED W. EANK,

*Petitioner and Plaintiff-Respondent*  
below,

vs.

SHEPARD STEAMSHIP COMPANY,  
a corporation,

*Respondent and Defendant-Appellant*  
below.

---

## PETITIONER'S BRIEF ON THE MERITS

---

### OPINION BELOW

This case involves an action by a seaman under the Jones Act (46 U.S.C. 688; 38 Stat. 1185; 41 Stat. 1007) against a steamship company for injuries received due to the negligent operation of a ship operated under a standard general agency agreement between the War Shipping Administration and the steamship company (Plf. Ex. 4; R. 106, 58). The case is identical with the case of *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, except that the injuries in this case were received after the effect date of the Clarification Act, also known as Public Law 17 (50 U.S.C. App. 1291, 57 Stat. 45).



while the injuries in the *Hust* case were received prior to the effective date of that Act.

This case comes before the Court on petition for writ of certiorari (granted November 22, 1948), to review the decision of the Supreme Court of the State of Oregon, which is reported in 46 Or. Adv. Sh. 393; 192 Pac. (2d) 258.

### STATEMENT ON JURISDICTION

The grounds upon which it is claimed that a federal question is involved in this case are that your petitioner has from the institution of this case sought to specially claim and enforce a right or privilege under a statute of the United States, within the meaning of Section 237(b) of the Judicial Code, as amended (28 U.S.C. 344(b)), and, in addition, that respondent has from the institution of this case sought to specially set up and claim a right, privilege or immunity under a statute of and also under a commission held and/or authority exercised under the United States, within the meaning of said Section 237(b).

As already stated, this case is an action by a seaman relying upon the rights and privileges provided under the Jones Act (46 U. S. C. 688; 38 Stat. 1185; 41 Stat. 1007).

Additional grounds of jurisdiction result from the fact that both petitioner and respondent sought during the course of the proceedings in the courts of the State

of Oregon to confirm the existence of the rights, privileges and immunities respectively claimed by them by reference to the provisions of the Clarification Act, Public Law 17 (50 U.S.C. App. Sec. 1291; 57 Stat. 45), and the Supreme Court of Oregon in its decision endeavored to interpret and construe the provisions of that federal statute (R. 24-32)

For a more detailed statement on jurisdiction see the petition for writ of certiorari filed herein, pp. 4-14.

### STATEMENT OF THE CASE

On June 8, 1943, petitioner shipped out as an able-bodied seaman on the Liberty ship S. S. George Davidson, after signing the usual shipping articles (Def. Ex. F, R. 109, 211). The ship was owned by the War Shipping Administration and operated under a standard general agency agreement between W. S. A. and Shepard Steamship Company, as general agent (Plf. Ex. 4, R. 106, 58). As usual, the crew for the ship had been furnished by a Union through its hiring hall (R. 87), and there were in effect Union agreements between the steamship company and various Unions (Plf. Ex. 1, 5, 9 and 10, R. 87, 98, 106, 135, 136 and 240). Despite the general agency agreement under which the vessel was operated, these Union agreements continued to negotiate for the settlement of disputes (R. 89, 90, 98; see also Plf. Ex. 11, R. 143, 70).

At about 7:30 P. M., on August 2, 1943, while said vessel was at sea two days out of the port of Hobart, Tas-

mania, plaintiff was ordered by the boatswain on said vessel to dump overboard the contents of several garbage cans. Other seamen were then and there available to assist in said task, but were not ordered to do so. The ship's garbage was disposed of by lifting it over the rail of the ship and dumping it overboard. The garbage can in question weighed in excess of 150 pounds and was large and bulky in size, and there was a heavy sea running at the time and the deck was wet and the ship was rolling and pitching heavily. As plaintiff was lifting said can, a sea rolled the ship and threw him off balance and threw the can back against him and his back gave way, causing the injuries complained of (R. 178, 179). His wages were later paid off by respondent company, with deductions for social security and "Victory tax" (Plf. Ex. 3, R. 102, 75).

It was stipulated that some Liberty ships were equipped with garbage chutes by which one man usually dumped garbage unassisted, while on other Liberty ships, including the vessel in question, no garbage chutes had been installed and sometimes one man performed the task and sometimes two men, depending upon whether the cans to be emptied were full. (R. 178)

In defense, respondent steamship company denied that it was engaged in the operation of the vessel, that it was the employer of the petitioner, and that petitioner had the right to file this action under the Jones Act in a State Court (Answer, par I, II and VI, R. 3,



4). Respondent also denied any negligence (Answer, par. III, R. 4).

By stipulation of the parties, the issue of whether plaintiff had the right to sue defendant under the Jones Act was tried before the Court, sitting without a jury, in advance of submitting to the jury the evidence on the question of negligence (R. 84). The trial Judge then rendered an opinion sustaining plaintiff's right to pursue this remedy (R. 173). The case was then submitted to the jury on the question of negligence (R. 178), resulting in a verdict and judgment for plaintiff in the amount of \$9,000.00 (R. 5, 6). It has now been stipulated that there was sufficient evidence of damages and extent of injuries to sustain this verdict (R. 187).

On appeal by the respondent herein, the Supreme Court of the State of Oregon reversed this verdict and judgment (R. 10, 32). In reaching this conclusion it was held that although this Court had established in the *Hust* case that for purposes of the Jones Act the crew of such a vessel were employees of the steamship company operating it under a general agency agreement (R. 14); the provisions of the Clarification Act must be construed as indicating an intention of Congress, after the effective date of that Act, to destroy the right of such seamen to bring actions under the Jones Act against the steamship companies (R. 28).

## SPECIFICATION OF ERRORS

The Supreme Court of the State of Oregon erred in holding that a seaman employed on a ship operated under the standard form of general agency agreement between the War Shipping Administration and various steamship companies and who was injured subsequent to the effective date of the Clarification Act, *supra*, does not have a cause of action which he may pursue in a state court under the Jones Act, with trial by jury, against such a steamship company as his employer for injuries received due to the negligent operation of the ship.

To so hold was error, for the following principal reasons:

1. This Court, in the case of *Hust v. Moore-Me-Cormack Lines, Inc.*, *supra*, expressly held that seamen employed on ships operated under standard general agency agreements are still employees of the general agents for the purposes of proceedings under the Jones Act.
2. The provisions of the Clarification Act do not limit such seamen after the effective date of the Act to suits against the United States under the Suits in Admiralty Act and cannot be regarded as a "clear and unequivocal command" to destroy, after the effective date of that Act, the rights of such seamen to bring proceedings under the Jones Act against steamship companies engaged as general agents.

## ARGUMENT

### I. SEAMEN ON SHIPS OPERATED UNDER GENERAL AGENCY AGREEMENTS ARE EMPLOYEES OF GENERAL AGENTS FOR PURPOSES OF JONES ACT.

#### A. *This Principle established in Hust Case under similar Facts.*

In *Hust v. Moore-McCormock Lines, Inc.*, *supra*, it was held by this Court that private steamship companies engaged as agents by the War Shipping Administration under the terms of uniform general agency agreements are the employers of injured seamen for the purposes of the Jones Act. Thus, Justice Rutledge, speaking for the majority court in that case, reviewed the uncertainties and complexities of a contrary decision upon injured seamen and their dependents, as well as upon the Government (Id. 715-722); and (at p. 722) recognized that "*Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command*", but that "*it is not permissible to find one by implication*", citing *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580. He went on to hold that nothing in the Suits in Admiralty Act or the General Agency Agreement of April 4, 1942, required or resulted in such a change (Id. at 723-725). The decision then goes on to state that:

"We may accept the Oregon court's conclusion that technically the agreement made Hust an employee of the United States. \* \* \* But it does not



follow \* \* \* that he lost all remedies against the operating 'agent' for such injuries as he incurred. This case \* \* \* involves something more than mere application to the facts of the common law test for ascertaining the vicarious responsibilities of a private employer for tortious conduct of an employee. Here indeed is the respondent's (Moore-McCormack Lines) fallacy, for it assumes the case would be controlled by the common law rules of private agency." (Id. 723-724).

This conclusion by the Supreme Court of the United States was reaffirmed in the case of *Caldarola v. Eckert et al.*, 332 U.S. 155, at 159. In that case, involving a longshoreman injured on January 27, 1944, the Court, speaking through Justice Frankfurter, held, referring to the *Hust* case:

"We there held that under the agency contract *the Agent was the 'employer' of an injured person as that term is used in the Jones Act and a seaman could therefore bring the statutory action against such an 'employer'.*"

Thus this Court in the *Caldarola* case, although holding that under New York law a general agent is not an owner *pro hac vice* and, therefore, that a longshoreman cannot sue a general agent, not only distinguishes the *Hust* case, but takes occasion to re-state its holding that general agents are employers of injured seamen for the purposes of the Jones Act—this by the very members of the Court who dissented in the *Hust* case—thus giving every indication that the Court regards that principle as now established and intends to so regard it in future cases. The dissenting opinion by Justice Rutledge in

the *Caldarola* case makes it further apparent that the *Hust* decision was not overruled, but simply held to be not controlling over an action by a longshoreman—not an employee under the Jones Act—and that the Court in the *Hust* case intended to preserve the rights of seamen against general agents under the Jones Act.

This position is entirely consistent with other recent decisions by the Supreme Court of the United States involving the determination of the employer-employee relationship and holding private corporations to be “employers” for the purposes of social legislation despite the fact that such a result might not be justified by application of common law tests and that “the primary consideration in determining the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guarantees and protection afforded by the Act.” See *N.L.R.B. v. Hearst Publications*, 322 U.S. 111; *United States v. Silk*, 331 U.S. 704. It has also been specifically held that an employee can hold two and even three corporations responsible as his “employers” under the Jones Act and Employers’ Liability Act, upon which the Jones Act is based. *Lavender v. Kurn*, 327 U.S. 645; 90 L. Ed. 916; *Armit v. Loveland*, 115 F. (2d) 308, 313-314.

The position that the general agent is the “employer” of an injured seaman is also fully supported by the record in both the *Hust* case and the instant case. This includes the following:

- (a) The Union contracts between the steamship companies, including respondent, and the Unions, including the Union of which petitioner was a member and also the Union which included the masters of the ships as members, under which the companies were designated as the employer and retained the right to hire and fire (Plf. Ex. 1, 5, 9 and 10; R. 87, 98, 106, 136 and 240; see also R. 124-130 and 166-169).
- (b) Evidence that during the war these agreements were expressly continued with the approval of the War Shipping Administration and that the steamship companies continued to negotiate grievances and to act otherwise as employers of the crew, and were recognized as such by both major federal labor agencies, The National War Labor Board and the National Labor Relations Board (Dft. Ex. C; R. 107, 188 at 190; R. 87-92, 98, 101, 125-6, 130, and 166-9); see also Plf. Ex. 11; R. 143, 70; Plf. Ex. 12 and 13; R. 166, 240, and Appendix A hereof). At that time even the War Shipping Administrator made no claim that such seamen were Government employees and declined to express an opinion on the question. (Dft. Ex. E; R. 108, 43, at 54)..
- (c) Provisions of the general agency agreement, including requirements that the crews were still to be procured by the steamship companies in the usual manner, it being specifically held by this Court in the *Hust* case that such agreements con-



tinued the employer-employee relationship between seamen and private steamship companies (see Appendix B hereof).

In view of the above evidence and the above quoted express holdings by this Court in the *Hust* and *Caldarola* cases, *supra*, it is submitted that any attorney would have advised a seaman injured under similar circumstances that he had a remedy under the Jones Act against the steamship company acting as general agent, subject only to the question whether a different result would be required by the language of the Clarification Act for injuries after the effective date of that Act—a question separately discussed below.

Yet in the face of this evidence and of these decisions, counsel for the Government now goes so far as to contend that such seamen are employees of the Government; that the Government had exclusive control over the operation of the ships, while its general agents were only “shoreside business agents”; that the *Hust* case was based upon a holding that the general agents were owners *pro hac vice*; that this was “modified” by a directly opposite holding in the *Caldarola* case, and that even if the general agents are employers of the crew they are not liable for injuries at sea due to the negligent operations of vessels by officers or crews not under their control (Memo by Resp. on Pet. for Cert., pp. 2-6). It thus becomes necessary to discuss these contentions.

B. *Position of Government Inconsistent with Previous Position and not supported by either Hust or Caldarola Case.*

1. Such Seamen are Employees of General Agents for Purposes of Jones Act.

It is first contended by respondent that such seamen are employees of the government, rather than of the general agents (Resp. Memo., p. 2.) But even though such seamen may technically and for some purposes be considered as government employees, the fact remains that for the purposes of the Jones Act they have been expressly held by this Court in both the *Hust* and *Caldarola* cases to be employees of the general agents (see Argument, *supra*, pp. .... to ....). Moreover, and as also pointed out above, it has been held that for the purposes of the Employers Liability Act and Jones Act, a worker may be considered to be an employee of more than one employer. *Lavender v. Kurn*, *supra*, and *Armit v. Loveland*, *supra*. Finally, attorneys for the Government, when appearing as *amicus curiae* in the Supreme Court of Oregon, took the following position:

"*Hust* was a decision in the great tradition of liberalizing the protection of maritime workers. \* \* \* So *Hust* held that 'employer' when used in the Jones Act \* \* \* includes 'any person acting in the interest of an employer' \* \* \* that any agent who procured or employed a seaman in the interests of the United States might be deemed the 'employer' for the purposes of an injured seaman's bringing the statutory action under the Jones Act." (Brief for United States as *Amicus Curiae*, p. 10).

It is therefore submitted that there can now be no denial, at least by the Government, but that petitioner must be considered as an employee of the respondent for the purposes of this case.

## 2. General Agent not Mere "Shoreside Business Agent".

It is argued by the Government that under the terms of the general agency agreement the United States had exclusive control over the operation of the vessel and that the Shepard Steamship Company was a mere "shoreside business agent" (Resp. Memo, pp. 2, 3). Conceding, for the purposes of argument alone, that, in view of the *Caldarola* case, *Shepard* may not have exclusive control and therefore may not have been the owner *pro hac vice*, it does not follow that *Shepard* thereby had no control whatever over the operation of the vessel, and such is not the holding of the *Caldarola* case. Indeed the provisions of the general agency agreement alone show that the general agents had at least a substantial measure of control over the operation of such a vessel, even if not exclusive control (see Appendix C). cf. *Quinn v. Southgate Nelson Corporation*, 121 F. (2d) 190, cert. den. 314 U. S. 682.

It likewise does not follow, even if the Government was the exclusive operator, that an injured seaman is thereby deprived of his remedy under the Jones Act against the general agent for an injury caused by the negligence of a fellow seaman or officer of the ship.



In the *Hust* case (at p. 725) this Court not only held that the common law test of "control" is inapplicable in such a case, but went on (at pp. 730-3) to hold as follows:

"The mere fact that the terms of the standard agreement were changed to omit the provision for manning the ship and substitute the provisions relating to employees contained in the General Service Agreement was not, in these circumstances enough to deprive seamen of that remedy. We do not think either Congress or the President intended to bring about such a result by the transfer of the industry to temporary governmental control. If this made them technically and temporarily employees of the United States, it did not sever altogether their relation to the operating agent; either for the purposes of securing employment or for other important functions relating to it. Nor did it disrupt the long-established scheme of rights and remedies provided by law to secure in various ways the seaman's personal safety either to deprive him of those rights altogether or to dilute or reduce them to the single mode of enforcement by the Suits in Admiralty Act procedure.

"This result is in accord with the spirit and policy of other provisions of the General Service Agreement. The managing agent selected the men, and did so by the usual procedure of dealing with the duly designated collective bargaining agent. It delivered them their pay, although from funds provided by the Government. It was authorized specifically to pay claims not only for wages, but also for personal injury and death incurred in the course of employment, for maintenance and cure, etc. It was responsible for keeping the ship in repair and for providing the seaman's supplies. For all of these expenditures not covered by insurance

the contract purported expressly to provide for indemnity from the Government.

"With so much of the former relation thus retained and so little of the additional risk thrown on the operating agent, it would be inconsonant not only with the prevailing law, but also with the agreement's spirit and general purpose to observe and keep in effect the seaman's ordinary and usual rights except as expressly nullified, for us to rule that he was deprived of his long existing scheme of remedies and remitted either to suit against the Government in personam in Admiralty. Our result also is in accord with the general policy of the Government and of the War Shipping Administration that those rights should be preserved and maintained, as completely as might be possible under existing law, against impairment due to the transfer."

3. *Hust* Case not based on Holding that General Agents were Owners *Pro Hac Vice* and not "Modified" by *Caldarola* Case.

The Government next states that "In the *Hust* case it was held that agents might be deemed operating agents or owners *pro hac vice*" and that this holding was "modified" in the *Caldarola* case" (Resp. Memo, pp. 4-5).

We do not presume to state the intentions of this Court. It is self-evident, however, that the majority opinion by Justice Rutledge in the *Hust* case was not based upon any theory of *pro hac vice*. Instead, it was the concurring opinion by Justice Douglas that adopted the *pro hac vice* theory of liability in the *Hust* case. It is equally self evident from the decision of this Court

in the *Caldarola* case that, while it may be inconsistent with the concurring opinion by Justice Douglas in the *Hust* case, it neither overruled nor "modified" the majority opinion by Justice Rutledge in that case. On the contrary, the *Hust* case was specifically recognized as holding that general agents are the employers of injured seamen for purposes of the Jones Act and that "a seaman could therefore bring the statutory action against such an 'employer'" (332 U. S. at 159).

Indeed, the Government, when appearing as *amicus curiae* in this case before the Supreme Court of Oregon, made no claim in its brief that the *Hust* case was either overruled or "modified" by the *Caldarola* case, but stated that the *Hust* case was a "great" decision in holding that the general agents are liable to injured seamen as "employers" under the Jones Act (*supra*, p. 12). Thus the Government, in good grace, can now hardly take a contrary position.

#### 4. Rules of Vicarious Tort Liability no Defense under Jones Act.

The Government next contends that the "vicarious liability" of the general agents does "not extend to the negligence of the Government's masters and crews who were doing the work of the United States in the physical management and operation of its vessels "not subject to the agent's control—even if the agent "be deemed their 'employer' as regards the institution of a Jones Act suit" (Resp. Memo. pp. 5, 6). The effect of this



argument would be to admit that an injured seaman is an "employee" of the steamship company for the purpose of bringing suit under the Jones Act, but to then hold that his fellow seamen and officers are not employees of the company for the purposes of the same suit, thereby rendering his remedy wholly meaningless.

The obvious answer to this attempt at hair-splitting is that exactly the same factual situation was presented in the *Hust* case, where the injury was also the result of the negligence of the ship's officers in the operation of the vessel. In that case the Oregon Supreme Court suggested a similar distinction, based on the same authority, in holding that:

"The defendant was not responsible for a negligent order of the boatswain which sent the plaintiff into a place of danger. \* \* \* The defendant had no control over these events and no means of preventing their occurrence. As an agent whose duty it was merely to procure the master and crew for employment by the United States, it was not responsible for their conduct to the plaintiff (Restatement, Agency, Sec. 79, Comment A); and, since plaintiff was not an employee of defendant, he could in no event sue the defendant under the Jones Act." (176 Or. 662, at 695).

But from the above quotation it is clear that even the Oregon Supreme Court recognized that the application of this principle of agency depended upon the assumption that plaintiff was not an employee of defendant. Thus, it having been held by this Court that injured seamen are employees of the general agents for

the purposes of the Jones Act, this distinction becomes inapplicable. That any attempted distinction by regarding the injured seaman as an employee and the seaman causing the injury as not an employee, both for the purposes of the Jones Act, is pure legal sophistry is clearly indicated by this Court in the *Hust* case, which specifically rejects the common law tests of vicarious liability. (At p. 724) Indeed, that decision squarely holds that a seaman injured due to negligence in the operation of a ship operated under the general agency agreement due to the negligence of its officers can recover judgment against the general agent under the Jones Act. That this argument by the Government has already been rejected by this Court in the *Hust* case was even recognized as unescapable by the Oregon Supreme Court in this case (R. 20-23).

The whole effect of the *Hust* decision is to preserve all rights and remedies by seamen against the steamship companies, a result which could clearly be sabotaged by the distinction now urged by the Government. Moreover, one of the "uncertainties and complexities" to which the Court (at pp. 721, 722) gave direct attention and expressed a clear intent to afford relief was the following difficulty:

"There would be other uncertainties and complexities. Were respondent's position to prevail, a seaman would be forced to predict, before instituting his suit, whether at the end of the litigation it would turn out that the cause of action alleged should have been asserted against the Government or against the private operator. Thus, it might

often be difficult to foretell whether the negligence alleged to have caused the injury would be attributed ultimately as the proof should turn out to some act of the master or a member of the crew, in which event only the Government, not the operating agent, would be liable, or to some default of that agent in discharging its specially limited but various duties, in which case it and at least in some instances not the Government would be responsible.

\* \* \*

"These are at least some of the uncertainties and complexities which would result from acceptance of respondent's view. It is hardly too much to say that substantive rights would be lost in an incalculable number of cases by the disruption such an acceptance would bring for rights long settled. The result also would be to throw large additional numbers into confusion which in the end could only defeat many of them." (Emphasis supplied).

Thus it is clear beyond doubt that this alleged distinction now urged by the Government is wholly unsound, and that since the same distinction might have been urged in the *Hust* case, the decision of this court in that case is controlling on the point and, in affording recovery to seaman injured due to negligence of the ship's officers in the operation of the ship, the *Hust* case must be regarded as requiring the same result in this case.

It is also argued by the Government in this connection that the "loaned servant" rule of *Denton v. M. V. R.R. Co.*, 284 U. S. 305, forecloses recovery in this case (Resp. Memo. p. 5). But in the *Denton* case recovery was



sought, not by a fellow employee of the railroad, but by a third person, and the action was not brought under the Employers Liability Act. As held in the *Hust* case, the test for determination of the employer-employee relationship for the purposes of the Employers Liability Act and Jones Act “involves something more than the mere application to the facts of the common law test for ascertaining the vicarious responsibilities of a private employer for the tortious conduct of an employee.” (Id. p. 724). Thus, as held in the *Caldarola* case, the *Hust* case did not impose upon general agents “duties of care to third persons” (332 U. S. at 159).

But in this case, as in the *Hust* case, there was no “loaning” of servants, which would require a division in the duties of the employee between two employers, and, of more importance, the problem in this and the *Hust* case was not one of vicarious responsibility to third persons, which was the situation involved in the *Denton* case. The “loaned servant” argument was equally available in the *Hust* case, since the facts on that question are identical. But in the *Hust* case it was held that a general agent is liable under the Jones Act to a seaman injured by the negligence of the officer of a vessel operated under a standard general agency agreement upon the ground that the seaman was the employee of the company. Exactly the same situation is presented in this case and, under the *Hust* case, exactly the same result is required by the decision of this Court in that case. Therefore, it being admitted that the *Hust* is still the law in establishing that general agents are “employers”

of injured seamen for the purposes of the Jones Act, the plaintiff must also prevail in this case unless a contrary result is required by provisions of the Clarification Act by reason of the fact that the injury in this case took place after the effective date of that Act.

#### 5. Points raised by Government resolved by *Hust* case.

In the *Hust* case the negligence alleged of the officers of the ship included failing to replace a burned out light for the boatswains' lockers, failing to maintain a guard chain or other guard around the opening to the lower locker, requiring plaintiff to work in total darkness and in an unsafe place, and failing to warn him of the dangers (see Record of *Hust* case). In this case the negligence alleged of this ship's officers was in requiring plaintiff, unassisted, to lift a heavy garbage can and dump it over the rail when there was a heavy sea running, and in failing to provide other seamen to help in this task.

In addition, it is to be noted that in this case the vessel was not equipped with a garbage chute, as used on some other Liberty ships, and which would have made it possible for one man to dump garbage without lifting heavy cans over the rail (R. 178). This, of course, might properly be chargeable as an act of negligence by the general agency under its duty to properly equip and maintain the vessel—even under the theory of the Government that it had no responsibility for the actual

operation of the vessel. Thus, the facts of this case are at least as strong, if not stronger, than the facts of the *Hust* case.

It is therefore of extreme significance that the Government has made no attempt whatever to distinguish this case from the *Hust* case upon the facts of negligence or responsibility for such negligence. It follows that since under the *Hust* case it was held that a seaman is entitled to recover under the Jones Act against a general agent for injuries received due to negligence of an officer of the ship in its operation at sea, the application of the same principle in this case requires that recovery by the plaintiff must be sustained. It also follows that the legal questions raised by the Government must be regarded as resolved by the decision in the *Hust* case, except for the question as to the effect of the Clarification Act upon claims arising after the effective date of that Act, which is next to be considered.

## II. THE CLARIFICATION ACT DID NOT SEVER THE EMPLOYER-EMPLOYEE RELATION BETWEEN SEAMEN AND GENERAL AGENTS NOR DESTROY THE JONES ACT REMEDY OF SUCH SEAMEN AGAINST SUCH STEAMSHIP COMPANIES.

### A. *Government Bound by Admission that Clarification Act has no Bearing on Issues of this Case.*

The Government would now reverse its previous position as to the effect of the Clarification Act (Pub-



lie Law 17, 50 U. S. C. App. Sec. 1291; 57 Stat. 45) upon the facts of this case and upon the remedies of seamen injured after the effective date of that Act. Thus, in its brief as *amicus curiae* before the Oregon Supreme Court, the Government, in referring to the Clarification Act, took the following position at p. 51 of that brief:

"The language of the Act thus makes it absolutely clear that the Congress did not intend to grant new rights, or impose new liabilities against the Government's agents or alter in the slightest any rights seamen might already have against them.  
\* \* \* \*

"It is clear that the sole intended effect of the Clarification Act was to remove all impediments to War Shipping Administration seamen's asserting their rights against the United States under the Jones Act and preserving their rights under the Social Security Acts. In return the Act discontinued their rights under the U. S. Employees' Compensation and Civil Service Retirement Acts, saving, however, such claims and causes of action as had theretofore accrued under those acts. We submit, therefore, that *the Clarification Act has no bearing on the present case.*" (Emphasis supplied)

This same admission by the Government was recognized by the Oregon Supreme Court in its opinion (See R. 32) and also in *McAllister v. Cosmopolitan Shipping Co., Inc.*, 169 F. (2d) 4, at 8.

It must also be kept in mind in considering this case that all parties to the *Hust* case were in complete agreement that the Clarification Act of itself did nothing to

change the pre-existing rights and remedies of seamen against private steamship companies and that any change in the employer-employee relationship for the purposes of the Jones Act from one between seamen and such companies to one between the seamen and the United States was to be determined solely upon the basis of the general agency agreement and the evidence relating to the war-time transfer of merchant shipping to government control, rather than upon any change required by the Clarification Act.

Thus counsel for the steamship company in the *Hust* case took the position before the Supreme Court of the United States that Public Law 17 "is merely a clarifying piece of legislation and shows, as clearly as if it had been passed before, the Congressional intent with regard to these seamen" (Resp. Br. in Opposition to Petition for Certiorari, p. 7). In further support of their position in the *Hust* case that the Clarification Act had no effect upon the employer-employee relationship, counsel took the position, speaking of the general agency agreement, that "We must look to it, therefore, to determine whether respondent was the employer of the crew on said vessel" (Resp. Br. on Merits, p. 5). Counsel also stated to the Supreme Court of the United States in the *Hust* that:

" \* \* \* we do not claim that Public Law 17 took away any rights of seamen in this respect. Both before and after Public Law 17, seamen employed by private employers could sue their employer under the Jones Act either by an in per-

sonam proceeding in admiralty or by an action at law with a jury trial." (Resp. Second Brief on Merits, p. 18.)

This position was likewise adopted by the Oregon Supreme Court when the question was presented to it in the *Hust* case. Thus it was held by that Court, speaking of the Clarification Act, that, if seamen on ships operated under general agency agreements were employees of the steamship companies, "no legislation was necessary to enable such seamen to sue the agent for its torts, since they already had that right under the Jones Act, *Hust v. Moore-McCormack Lines, Inc.*, 176 Or. 662, 683; that Congress in passing that statute "was content to leave the matter of agents' liability to the courts", *Id.* at 689; and that:

"We do not mean to suggest that the purpose of the law was to grant to agents immunity from suit for their own torts, but simply that it leaves the question of the agents' liability untouched. It does not purport to create between the seamen and general agents of the War Shipping Administration a relationship of employer and employee, which, but for the Act, would not exist, nor to impose upon such agents liability for a tort which they did not commit. The whole purpose and intent of Section I, in our opinion, was to create and declare in favor of seamen employed by the United States rights and remedies against the United States." (*Idem*, emphasis supplied.)

The Government of the United States, appearing as amicus curiae before this Court in the *Hust* case, took the position in its brief that:



"Although the injury to petitioner occurred before the adoption of Public Law 17, *that Act is pertinent because it is declaratory of the previously understood law and practice with respect to the incidence of liability for injuries, and the decision in the present case will probably determine whether similar suits can be maintained with reference to the subsequent period as well as the period before the Act.*" (Brief of U. S. p. 2, emphasis supplied.)

and, later, ~~that~~:

"There can be no doubt that as to such suits for personal injuries to seamen on merchant vessels 'owned by or bareboat-chartered to the War Shipping Administration' the Act was viewed as declaratory of pre-existing law. (S. Rep. No. 62, 78th Cong., 1st Sess., p. 5; see also *idem* p. 11; H. Rep. No. 107, 78th Cong., 1st Sess., pp. 2, 16.)" (Id. at p. 8.)

Now, however, the Government takes the position for the first time that by the Clarification Act it was intended by Congress that as to all future claims injured seamen were to be restricted to suits against the United States and could no longer bring actions under the Jones Act against steamship companies acting as general agents (Resp. Memo. p. 7).

It is therefore submitted that the respondent is bound by the admissions previously made by the Government in this same case. See *Daitz Flying Corp. v. United States*, (E.D.N.Y.) 4 F.R.D. 372. Cf. *United States v. Continental-American Bank & Trust Co.*, 79 F. Supp. 450 at 452. If, however, this Court desires to consider

argument on the merits of this question, and without waiving this contention, petitioner submits the following.

*B. Rights of Seamen under Jones Act against General Agents can be destroyed only by Clear and Unequivocal Command.*

The respondent in this case now takes the position that simply because the Clarification Act provides that such seamen may have a remedy against the United States under the Suits in Admiralty Act they are deprived of the right to sue the steamship companies under the Jones Act. To reach such a conclusion it is apparent that this Court must hold either: (1) That the Clarification Act of itself destroyed the employer-employee relationship theretofore existing between such seamen and steamship companies, or (2) that the Act, although not destroying that employer-employee relationship, was intended to and did amend the Jones Act by destroying the rights of such employees created by that Act to bring suit against their own employers for personal injuries.

Once again it must be kept in mind that only by "clear and unequivocal command" can the employer-employee relationship between seamen and steamship companies, together with the accompanying rights and remedies under the Jones Act against such steamship companies be destroyed and that such a result is not to be found by implication. *Hust v. Moore-McCormack Lines, Inc.*, supra, at 722; *Brady v. Rooserelt S.S. Co.*, 317 U.S. 575,

at 580-1. This is in accord with the universally accepted rule that repeals by implication are not favored.

Had Congress intended to grant immunity to general agents it would have done so in clear and unambiguous language, for, as indicated by the legislative history of the Act, Congress recognized the possibility that general agents would have an independent tort liability (see Appendix D). Instead of granting immunity from suit to general agents, Congress was scrupulously careful to so amend the existing law as to provide for insurance coverage for general agents (see Section 3(i)). This legislation obviously does not meet the test of disturbing existing rights and remedies of seamen against general agents only by "clear and unequivocal command."

This Court in the *Hust* case, *supra*, held that the determination that seamen employed on ships operated under general agency agreements were still employees of the steamship companies for the purposes of the Jones Act, which was reached after consideration of the problem and an analysis of the general agency agreement, was simply "confirmed" by the legislative history and provisions of the Clarification Act (*Id.* at 725) and that:

"Indeed one primary occasion for enacting the Clarification Act was to save the seamen's rights in these respects rather than to take them away." (*Id.* at p. 726).

and, later that:



"The entire history of the Clarification Act will be read in vain, however, for any clear expression of intent or purpose to take away rights, *substantive or remedial*, of which the seaman had not already been deprived, actually or possibly, by virtue of the transfer. Whether or not this conserving intent was made effective in the prospectively operating provisions of the Act, it is made clear beyond question in the retroactive ones. Congress was confessedly in a state of uncertainty. But, being so, it nevertheless had no purpose to destroy rights already accrued and in force, whether substantive or remedial in character. Its object, in this respect at the least, was to preserve them and at the same time to provide an *additional assured remedy* in case what had been preserved might turn out for some reason to be either doubtful or lost." (Id. at 733; emphasis supplied.)

It follows from these observations that in adopting the Clarification Act the Congress must have had no intent to and did not in any manner change the status of seamen employed on ships operated under general agency agreements as either employees of the private steamship companies or as employees of the United States. That question was unaffected by any provision of the Act and was left to the Courts for determination upon the basis of the pre-existing law, the general agency agreements and other evidence. As previously pointed out, that question has now been decisively determined and re-affirmed by this Court in the *Hust* and *Caldarola* cases in holding that for the purposes of the Jones Act such companies are to be regarded as the employer of the seamen engaged on such ships.

It is therefore impossible to take the position that the Clarification Act had any effect upon the status of seamen as employees of the steamship companies designated as general agents. Respondent must thus fall back upon the position that the Clarification Act was intended to deprive such seamen of their previously existing right to bring actions for personal injuries against such steamship companies under the Jones Act in state courts, with right of trial by jury. In taking this position respondent must take one or the other of two possible views of the understanding and intent of Congress in passing the Clarification Act: (1) That Congress mistakenly assumed that under general agency agreements such seamen were employees of the United States, rather than of the private steamship companies, and therefore provided only for remedies against the United States, or (2) that Congress was uncertain whether as the result of the general agency agreements such seamen would be employees of the United States or of the private steamship companies, but intended to preserve all rights and remedies of seamen intact and to protect the seamen by providing at least an assured remedy against the United States.

*C. Under any View of the Clarification Act it did Nothing to destroy the previously Existing Rights and Remedies under the Jones Act of Seamen employed on Ships operated under General Agency Agreements against Private Steamship Companies as their Employers.*

1. View that Congress mistakenly assumed seamen to be employees of the United States.

In this case the Government is apparently proceeding on the assumption that such seamen on ships operated under general agency agreements were government employees and that they were so recognized by Congress in adopting the Clarification Act (Resp. Memo. 2-6).

Moreover, the principal argument of the Government, in its brief as amicus curiae in the *Hust* case, was to the effect that both the War Shipping Administration, other government agencies, and Congress itself, as shown by the legislative history of the Clarification Act, "recognized" the "status of merchant seamen," such as petitioner in that case, "as employees of the United States" (Brief of U. S. as Amicus Curiae, pp. 4, 7 and 8).

It thus being clear that the entire assumption on which appellant's argument is based is that merchant seamen had become employees of the United States and that they were so regarded by Congress, and it having now been held by the Supreme Court of the United States that this assumption by Congress as to the legal status of merchant seamen at the time of passing the Clarification Act, if there was any such assumption, was wholly in error, the entire argument must fall. When it is assumed that Congress understood that merchant seamen had already become government em-



employees, the statements made in the Congressional reports to the effect that the claims of such seamen for personal injuries "would be enforceable by suits against the United States under the Suits in Admiralty Act" wholly fail to support its contention that such claim were intended to be enforced *only* in that way.

If Congress assumed that merchant seamen had already become government employees, the provisions under the Clarification Act for a remedy against the United States under the Suits in the Admiralty Act were intended to be exclusive only in the sense and to the extent that the United States was the exclusive employer. In other words, the Act was intended to regulate only those actions which could be brought against the United States. Nowhere in either the Act or its legislative history, as pointed out by this Court in the *Hust* case (at p. 733), is there any expression of an intent to take away any right or remedy that such seamen might have had against private employers, and the references in the Congressional reports to the possible liability of steamship companies under the *Brady* case, *supra*, make this doubly clear. (See appendix D.) Therefore, it is clear beyond doubt that if this entire assumption was erroneous and if private steamship companies were either jointly or exclusively responsible as employers for the purposes of the Jones Act, as now held by this Court, then there must have been no intent to destroy the remedy of such seamen under the Jones Act against such private employers, nor was there ef-

fective statutory language of the "clear and unequivocal" nature required to make any such intent effective, as required by the *Hust* and *Brady* cases, *supra*.

• If counsel should ask in reply what purpose Congress could have had in adapting the Clarification Act if this be true, since seamen employed by the United States already had such a remedy against the Government under the Suits in Admiralty Act, the answer, as already demonstrated above, is that the Clarification Act was not intended to change or destroy any pre-existing rights or remedies between seamen and steamship companies, but only to be declarative of previously existing rights and remedies against the Government. As to any further intended effects, the language of counsel for respondent in the *Hust* case, as stated to this Court, is perhaps the most appropriate answer:

"Public Law 17 did not change any of these rights. All it did was (1) to extend the *same* rights of seamen on *merchant* vessels of the United States to seamen on *public* vessels of the United States, and (2) to require administrative disallowance of the claim before filing suit, in order to prevent unnecessary or premature litigation against the United States." (House Report, p. 21.)

Therefore, we do not claim that Public Law 17 took away any rights of seamen in this respect. Both before and after Public Law 17, seamen employed by private employers could sue their employer under the Jones Act either by an in personam proceeding in admiralty, or by an action at law with a jury trial. And seamen who were employees of the Government on merchant vessels could enforce their substantive rights under the

Jones Act only under the Suits in Admiralty Act." (Emphasis supplied; Resp. 2nd Brief on Merits, pp. 17, 18.)

See also the position taken by the Government in the Oregon Supreme Court in this case as to the intended effect of the Clarification Act (*Supra*, p. 26).

2. View that Congress was uncertain as to the status of merchant seamen, but intended to preserve all their rights and remedies and to provide at least an assured remedy against the Government.

Contrary to the view set forth above to the effect that Congress assumed at the time it enacted Public Law No. 17 that merchant seamen had already become employees of the United States and based the statute upon that assumption, is the view adopted by the Supreme Court of the United States in the *Hust* case, *supra*. Thus the Court, speaking through Justice Rutledge, held that "*Congress was confessedly in a state of uncertainty*" (*Id.* at 733; emphasis supplied), and that " \* \* \* Congress did not enumerate the specific rights which it considered seamen to have prior to the Clarification Act and after the industry transfer to government control. To have done so, in view of its own *uncertainty* in this respect, including the effects of the *Brady* decision, would have been hazardous." (*Id.* at 730; emphasis supplied.) Similarly, it was held that:

"Indeed one primary occasion for enacting the Clarification Act was to save the seamen's rights in these respects rather than to take them away."



"It is true there was great concern for fear that these rights had been lost or seriously attenuated by the transfer to government control, particularly during the earlier stages of Congressional consideration when the *Brady* decision had not removed the large cloud cast over them by the *Lustgarten* ruling. Nor did *Brady* remove all of the doubt in the minds of those sponsoring the bill, as the committee reports during the later stages of consideration disclose. Hence, to make certain that the seamen would have at least the remedy provided by the *Suits in Admiralty Act* for enforcement of his substantive rights, as well as to take care of other important matters not affecting them, the bill proceeded to enactment." (Id. at 726; emphasis supplied.)

This view is fully supported by the legislative history of the Act, for, as stated in House Report No. 107, 78th Cong., 1st Sess., p. 3:

◦ "The basis scope and philosophy of the measure is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefit. Except in rare cases the ships themselves are being operated as merchant vessels, and are therefore subject to the *Suits in Admiralty Act*. Granting seamen rights to sue under that Act is therefore entirely consistent with the underlying pattern of the measure." (Emphasis supplied.)

Even the War Shipping Administration was uncertain as to whether merchant seamen had become employees of the United States, as shown by the fact that in correspondence with the National Labor Relations Board as late as November 9, 1943, the War Shipping Administration declined to take a definite position on

this question (R. 53, 54). Moreover, the chairman of the War Shipping Administration, in a statement read at the hearings on the Clarification Act, testified that " \* \* \* it would be best to maintain the status of seamen as private employees with respect to such matters" (Hearings before Committee on Merchant Marine, etc., on H. R. 7424, 77th Cong., 2nd Sess. p. 14). He also recognized that the general agents might have an independent liability (Id. at p. 17).

In addition, the denial to such seamen, even before the passage of Public Law 17, of the benefits of the United States Employees Compensation Act and Civil Service Retirement Act, shows that they were not regarded by other government agencies as exclusively government employees as of the date of passage of Public Law 17 (House Report No. 107, *supra*, p. 2). Attention has been called to the fact that they were not so regarded by the National Labor Relations Board and National War Labor Board (see Appendix A).

Therefore, since Congress was in a state of uncertainty as to the status of such seamen and intended primarily to preserve their private rights, it must follow, under this view of the Clarification Act, that there could have been no Congressional intent to destroy the remedy of such seamen under the Jones Act to bring suit in state courts, with right of trial by jury, against the steamship companies who had been designated as general agents and have since been held to be their employers for the

purpose of that Act. At the least there was not "clear and unequivocal" expression of any such intent.

*D. Retroactive Provisions of Clarification Act do not change this Result.*

The principle remaining question under the Clarification Act is whether its retroactive provisions impinge upon its prospective effect, for, as pointed out by counsel, the Court expressly stated in the *Hust* case, *supra*, that:

"We need not determine in this case whether prospectively the Clarification Act affected rights of the seamen against the operating agent and others, or simply made sure that his rights were enforceable against the Government. We make no suggestion in that respect. For this case, on the facts, is not governed by the statute's prospective operation." (Id. at 727.)

The Oregon Supreme Court held that simply because the retroactive provision of the Act provided that for claims accruing between October 1, 1941, and March 24, 1943 (the effective date of the Clarification Act), injured seamen had an election whether to sue the Government under the provisions and procedure established by the Act, it must follow that the Act had the intended effect of foreclosing all actions against private steamship companies after it became effective (R. 31).

If the Clarification Act had provided a *new* remedy not theretofore in existence, such an argument might have some force. But where, as conceded in this case, the statute was merely declaratory of previously exist-



ing rights, and since at the most it sought to provide to injured seamen the benefit of an assured remedy against the Government which they would have had in any event if employees of the United States, the same argument is not convincing.

Before this Court can accept such an argument it must find that the simple expedient of extending retroactively the assured remedy against the Government was intended to and did constitute a "clear and unequivocal command", within the meaning of the *Brady* and *Hust* cases, either that from thence forward the employer-employee relationship theretofore existing for the purposes of the Jones Act between merchant seamen and steamship companies was to be destroyed by legislative fiat alone or that the Jones Act was to be amended to deny to such seamen the remedy guaranteed by that Act against those who were their employers for the purposes of that Act.

As demonstrated above, it is now established law that merchant seamen engaged on ships owned by the War Shipping Administration and operated under general agency agreements by private steamship companies are the "employees" of such companies for the purposes of the Jones Act. As also pointed out above, the Clarification Act was intended to save and protect the rights and remedies of merchant seamen, and not one word of its legislative history or of its provisions can be honestly interpreted as intended to have either of the far-reaching effects necessary to support the argument of appel-

lant in this case or to constitute a "clear and unequivocal command" to either of those effects.

It is only by *implication* of the most strained sort that such an effect can be found and, as held in the *Brady* and *Hust* cases, the basic rights of merchant seamen are not to be taken away by mere implication. As held by the Supreme Court of the United States, the right to jury trial in a state court alone is "part and parcel" of the remedy afforded under the Employers Liability Act and Jones Act and to deprive a worker of the benefit of jury trial is to take away "a goodly portion of the relief which Congress has afforded them". *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 354.

It therefore follows that neither the provision by the Clarification Act of an assured remedy to merchant seamen against the United States under the Suits in Admiralty Act nor the extension of such benefits retroactively to October 1, 1941, could have the effect of depriving merchant seamen of their rights under the Jones Act against private steamship companies—a matter which was then uncertain in the minds of Congress because of the then undetermined effects of the transfer of the merchant marine to government ownership, but which was at least considered and protected by Congress in passing the Clarification Act, as shown by its legislative history, and which has since been recognized by this Court in the *Hust* case and reaffirmed in the *Caldarola* case.

E. *Denial of Jury Trial in Suits against Government does not destroy Right of Jury Trial against Steamship Companies.*

The Oregon Supreme Court apparently relied, at least to some extent, upon the fact that Congress expressly considered a request by the C.I.O. that jury trials be allowed in suits by such seamen against the Government, as provided under the Clarification Act, and deliberately decided not to allow a jury trial in such proceedings (R. 29). It is natural that the C.I.O. be concerned lest seamen lose their valuable right of trial by jury, particularly since Congress, according to respondent, understood that merchant seamen might have become employees of the Government. But what the C.I.O. wanted and what the Attorney General advised against was not the continued allowance to merchant seamen of their right to trial by jury against private employers, *but a right of trial by jury against the Government* in order to fully preserve both seamen's rights and remedies under the Jones Act, even though they might have become government employees. This is clear from the statement, in the first paragraph of the letter of the Attorney General, that "the suggestion was presented on behalf of the N.M.U. that an action at law with jury trial should be afforded seamen where claims are presented *against the United States* \* \* \*" and, in Section (3) of the same letter, that Congress has rarely allowed a jury trial against the United States" (H. R. 7424 Hearings, *supra*, p. 33, filed by appellant with its brief). This interpretation was wholly concurred in by counsel



for the steamship companies before the Supreme Court of the United States in the *Hust* case, in which they agreed that Public Law 17 did not take away the right to jury trial of a privately employed seaman but only declined to grant a similar right in actions against the Government (Resp. Second Brief on the Merits, p. 20; see also House Report No. 2572, p. 14).

*F. Provisions that Remedy against Government "shall" be under Suits in Admiralty Act not destructive of Rights and Remedies against Steamship Companies.*

The Oregon Supreme Court also considered it to be of some importance that Section 1 of the Clarification Act provided that claims by seamen for personal injuries "shall" be enforced under the Suits in Admiralty Act (R. 29).

As also pointed out above, the Clarification Act did nothing to take away any pre-existing rights of merchant seamen (see also *Hust* case, supra, at p. 733), but was intended to conserve all such rights despite the confusion resulting from the war-time transfer of merchant shipping to government control and, at the least, to provide an assured remedy against the Government under the Suits in Admiralty Act (Id. at pp. 726, 727).

The provisions of Section 1 of that Act show beyond doubt that the entire contents of that section were based upon the assumption, although recognized by Congress

to be doubtful, that such seamen may have become, at least technically and for some purposes, employees of the Government by virtue of the war-time transfer of merchant shipping to government control and that a remedy against the Government should therefore be provided. Since, however, it has now been held that at least for the purposes of the Jones Act private steamship companies are still responsible as the employers of such seamen, and in view of the conserving intent of Congress in passing that Act and the absence of any clear expression of an intent to destroy that relationship or the rights created thereby, it must follow that Section 1 of the Clarification Act is to be considered solely as it concerns the remedies of such seamen against the United States and as exclusive in that sense only. By the same token, Section 1 cannot be considered as indicating any intent to destroy or exclude the rights and remedies of such seamen against private steamship companies, which could only be destroyed by clear and express language nowhere set forth in Section 1 or otherwise in the Clarification Act.

Thus the provisions of Section 1 of the Clarification Act requiring that any claim, if administratively disallowed, *shall* be enforced under the provisions of the Suits in Admiralty Act, must be taken as referring only to the prosecution of such claims as against the Government, rather than as intended to destroy the rights of seamen who may have still been employees of private

steamship companies for the Jones Act to bring direct action against such employers.

That such is the proper interpretation of Section 1 is further confirmed by the fact that the following provision of Section 1 allows such a remedy "notwithstanding the vessel \* \* \* is not a merchant ship \* \* \*", thereby extending the provisions of the Suits in Admiralty Act to seamen injured on "public vessels". This fully explains the use of the term "shall". In other words, this provision means nothing more than that merchant seamen *shall* be entitled to the benefit of the Suits in Admiralty Act for claims for personal injuries even though employed on public vessels.

A further explanation of the requirement that such claims against the Government "shall" be enforced under the Suits in Admiralty Act is to be found in the following language of Senate Report No. 62, *supra*:

"It is the spirit and intent of section 1 to avoid possibilities of double recovery which might otherwise arise if a seaman pursued his rights under section 1 and then attempted to pursue comparable rights or such recovery for the same or similar events under other law or provision; and, on the other hand, which might arise with respect to retroactive rights which the claimant elects to pursue as if section 1 was in effect at the time of accrual of the claim.

"The effect of this legislation is to eliminate the danger that seamen may recover both against the Federal employees' compensation fund and under his statutory or common-law remedies for the same



injury." (Senate Report No. 62, p. 12, 78th Cong., 1st Sess.)

With such expressed and natural meanings as set forth above there is no room for the strained implication that the single word "shall" was intended to strip injured seamen of their long established rights to bring actions in state courts against such steamship companies as might be held by the courts to be their employers for the purpose of the Jones Act.

Furthermore, it is to be noted that the Chairman of the War Shipping Administration, in a letter included in the Congressional reports referring to this section *did not state that such claims could only be enforced by suit against the United States under the Suits in Admiralty Act*. Instead, we find the statement that:

"The claims would be enforceable by suit *against the United States only* under the Suits in Admiralty Act." (House Report No. 2572, p. 29, 77th Cong., 2nd Sess.)

It is thus further apparent that the Clarification Act was only intended to deal with the remedies of seamen against the United States and that it was in that sense alone that the remedy under the Suits in Admiralty Act was meant to be exclusive, rather than that there was any intent to destroy the rights of seamen against private steamship companies, which were at all times intended to be fully preserved.

In other words, as held by this Court in the *Hust* case, at p. 733, the object of the Clarification Act was not to

provide that the remedy against the Government was to be an exclusive remedy, as now contended by respondent, but was to preserve all rights and remedies and "to provide an *additional assured remedy* in case what had been preserved might turn out for some reason to be either doubtful or lost".

G. *Weight of Authority supports Petitioner and is opposed to Decision by Oregon Supreme Court.*

The decision by Judge Augustus N. Hand, speaking for a unanimous Court, in *McAllister v. Cosmopolitan Shipping Co.* (C.C.A. 2nd), 169 F. (2d) 4, now pending decision by this Court, is, we submit, a correct statement of the liability of a general agent and of the effect of the Clarification Act upon claims arising after the effective date of that Act. In referring to the *Hust* case, it was held by that Court, at p. 8, as follows:

"The opinion expressly disclaimed any intention of dealing with liability for prospective acts of negligence, but the theory of liability which it adopted seems to be equally applicable to such acts. The Clarification Act, however, makes no reference to the liability of a general agent and we cannot see why it should be thought to eliminate such liability, if it existed. Moreover, it is to be noted that the Government in its brief as *amicus curiae* makes no claim that the Clarification Act has any bearing on the plaintiff's right of recovery. We believe that the purpose of the Act was to clarify the right against the United States of seamen employed by the War Shipping Administration and not to disturb other rights of seamen against the general agents so far as they existed."

As held by Judge Coleman in *Cohen v. American Petroleum Transport Corp.* (City Ct. N. Y.), 1947 A.M.C. 336, at 337, 338, in speaking of the Clarification Act:

" \* \* \* it is plain from a reading of the statute itself and without the aid of the committee reports that what was intended to be fixed was the liability of the government toward the seamen; the rights and obligations of seamen vis-a-vis the government were alone in question. The statute provided that because of the temporary wartime character of their employment by the War Shipping Administration, seamen 'employed \* \* \* as employees of the United States through the War Shipping Administration' were 'not to be considered as officers or employees of the United States for the purposes of the U. S. Employees Compensation Act, \* \* \* the Civil Service Retirement Act,' etc. They were, however, to 'have all of the rights \* \* \* under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels,' that is to say, among other rights, those under the Jones Act. And those rights could only be enforced in admiralty under the Suits in Admiralty Act. Is it not clear that Congress was speaking only of seamen who, it thought, were employees of the United States and only of the obligations which the United States as employer owed them? \* \* \* Yet the fact is that the liability of the operators is in no way touched in the statute. Their obligation to the members of the crew therefore remain as they were without reference to it; and by virtue of the *Hust* case they are liable under the Jones Act."

Another interesting discussion of the "Election Clause" of the Clarification Act is set forth in *Little v.*



*Moore-McCormack Lines, Inc.* (Sup. Ct. of Baltimore, Md.), 1948 A.M.C. 1337, at 1348, as follows:

"In my opinion, the meaning of the Election Clause is far less abstruse than is indicated by the discussion which it has been given. The rights of privately employed seamen against private employers were not and had not been either in doubt, or the subject of any controversy; they were under Social Security, and they could sue their private employers under the Jones Act. Nor was there any doubt, after the *Brady case*, that if a seaman had rights against both the United States and a private person, he could enforce both. What were in great doubt were the rights of seamen employed by the United States, both on public and on merchant vessels, against the United States. The object of the Election Clause was therefore merely to provide that during the period between October 1, 1941 and March 24, 1943, the seamen had an election to make claims against the United States either (1) under the U. S. Compensation Act and the other Acts applicable to Government employees; or (2) under the Clarification Act i.e., for Jones Act rights through Suits in Admiralty Act procedure. There was no need to define rights against private employers, and the Clarification Act has no bearing upon who is or is not an employer."

Other decisions, representing the decided weight of judicial authority, are in accord with the proposition that such seamen may sue general agents under the Jones Act, with right of trial by jury, for claims arising after the effective date of the Clarification Act. *Warren v. U. S.*, 75 F. Sup. 210; and 76 F. Sup. 735 (S. D. N. Y., J. Medina); *Healy v. Sprague S.S. Co.*, 76 N.Y.S. (2d) 564; *Guay v. American Presidents Line*

(Calif.); 184 P. (2d) 539; *Miller v. Wessel, DuVall and Co.* (S.D.N.Y.), 1947 A.M.C., 429; *Bennett v. Willmore S.S. Corp.* (S.D. Tex.), 69 F. Sup. 427; *Koistinen v. American Export Lines, Inc.*, 1948 A.M.C. 1464; *Casey v. American Export Lines* (J. Alfred C. Coxe, S.D.N.Y. Dec. 17, 1947), unreported.

### CONCLUSION

This is a case in which the Government, at the last moment, has assumed the defense of a case in an attempt to protect private steamship companies from liability and to destroy the long established right of seamen employed on ships operated under general agency agreements to bring suit under the Jones Act against such companies in state courts, with right of trial by jury. The Government, which first, and even after the *Caldarola* decision, acclaimed the decision of this Court in the *Hust* case as a decision "in the great tradition of the Jones Act; a natural link in the process of liberalizing the protection of maritime workers" (Gov. Amicus Curiae Br. in Ore. Sup. Ct., p. 10), now contends that the *Hust* case should be regarded as having been overruled by the *Caldarola* case.

But instead of overruling the *Hust* case, this Court in the *Caldarola* case expressly recognized that it was established by the *Hust* case that such general agents are liable to such seamen as their employers under the Jones Act. The next line of defense by the Government, without distinguishing the facts of this case from those

of the *Hust* case, has been to offer legal arguments which were equally applicable to the facts of the *Hust* case and must therefore be considered as resolved by the decision of this Court in that case.

Finally, the Government, after first admitting and conceding that the Clarification Act did not "alter in the slightest any rights seamen might have" against general agents and that it "has no bearing on the present case" (Govt. Amicus Curiae Br.<sup>e</sup> in Ore. Sup. Ct. p. 51), now contends that it was intended to destroy the previous remedy of such seamen against such general agents under the Jones Act. But, as demonstrated above, this result can only be reached if the Clarification Act either destroyed the previously existing relation of employer-employee between such seamen and steamship companies, as recognized to exist in the *Hust* case, or else repealed the Jones Act solely by implication so as to destroy the previous remedy under that Act by such seamen against such companies. But, as recognized by this Court in the *Brady* and *Hust* cases, such rights and remedies can only be destroyed by clear and unequivocal command, whereas the Clarification Act was intended only to provide an *additional* assured remedy against the Government and not to destroy any pre-existing remedy against the steamship companies.

Thus the Government would now lend its hand to again resurrect the doctrine of the *Lustgarten* case, *Johnson v. Fleet Corp.*, 280 U. S. 320, which limited the remedy of such seamen to proceedings under the Suits



in Admiralty Act against the Government — without right of trial by jury—a doctrine first rejected by this Court in the *Brady* case and more recently expressly condemned in the *Hust* case.

It has been recognized by this Court that the right to jury trial is "part and parcel" of the remedy afforded under the Jones Act and that to deprive workers of the benefit of a jury trial is to take away "a goodly portion of the relief which Congress has afforded them". *Bailey v. Central Vermont Ry.*, 319 U. S. 350. See also *Tenant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35.

Yet the Government now contends for a result under which thousands of American seamen will be deprived of their rights to bring suit in state courts under the Jones Act, with the guaranty of trial by jury, against the large proportion of steamship companies now operating under standard agency agreements.

The plaintiff in this case has been willing to incur the expense and delay of protracted litigation and to undergo the "uncertainties" and the difficulties in foretelling his proper remedy, as recognized in the *Hust* case (at p. 721) to be a reason for preserving the remedy under the Jones Act of seamen employed on ships operating under general agency agreements against steamship companies. If it is now held by this Court that he has mistaken his proper remedy, he will be barred by the Statute of Limitations from bringing suit against the Government under the Suits in Admiralty Act. He has

been awarded by a jury a verdict of \$9,000.00. It has been stipulated that the amount of this verdict is sustained by the evidence of damages and the extent of his injuries (R. 187). It is a fair verdict and should be reinstated.

Respectfully submitted,

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## APPENDIX A

In the briefs submitted to this Court in *Hust. v. Moore-McCormack Lines, Inc.*, supra, the following arguments, among others, were made on the issue of whether seamen engaged on ships operated under general agency agreements were employees of the steamship companies or of the United States and are likewise applicable in this case:

"The record shows that at the time of the accident in this case respondent company was under at least five collective bargaining agreements with various unions, all of which designated the Moore-McCormack Lines, Inc. (of the Pacific Republic Lines, its prototype on the Pacific Coast, R. 161), as one of the "employers" (see Ex. 14, 15, 18, 19, 20; admitted R. 114, 115). It is true that subsequent to the execution of these contracts the unions signed a so-called "Statement of Policy", setting forth Section 3A(d) of the General Agency Agreement, "freezing" the terms of union contracts for the duration of the war, agreeing that the unions should "cooperate" with the War Shipping Administration in maintaining discipline aboard ship and not exercise their right to strike (see R. 167-168). Nothing in this statement indicated, however, that this statement was to be anything more than indicated by its title, namely, a mere expression of policy. There was nothing to indicate that the W.S.A. was to be substituted for the companies as the employer under the union contracts, and it was made clear not only that the crews would be procured by the agents in the usual manner, but that disputes should be settled by collective bargaining between the companies and the unions as set forth in their agreements (Idem).

"As stated in the *Moss* case, supra, (*Moss v. Alaska Packers Assoc.*, 1945 A.M.C. Vol. 4, 493),



in holding that under the general agency agreements the crews continued to be employees of the steamship companies, and in commenting upon this 'Statement of Policy':

"The Statement of Policy announced by the War Shipping Administration, in explanation of that part of the service agreement, having to do with the hiring of merchant seamen, specifically provides that agreements between unions and private ship owners be continued and that seamen be employed pursuant to such agreements."

"Conclusive evidence of the fact that neither this Statement of Policy nor the General Agency Agreement itself changed the employer-employee relationship previously existing between the steamship companies and union members is to be found in the fact that the companies and unions continued to bargain as employer and as employee representatives. Thus these parties proceeded later to negotiate supplemental agreements for overtime pay to seamen (see Ex. 15, p. 64, R. 114; Ex. 20, p. 20, R. 115); (see also Ex. 14, pp. 33-35). In addition \* \* \* the National War Labor Board continued to take jurisdiction over disputes between the companies and unions and to regard the companies as the employers of the crews" (Brief in Support of Pet. for Certiorari, pp. 40-42).

And elsewhere in said brief:

"We \* \* \* think it to be of extreme significance that the two principal federal labor agencies with jurisdiction over labor problems involving seamen and which have no jurisdiction over employees of the government have apparently taken the uniform position that under such General Agency Agreements the steamship companies continue to be the employers of the crews. Thus a panel of the National War Labor Board in the case of *Atlantic &*

*Gulf Coast Agents and Pacific American Assn.*, 16 W.L.R. 23; May 6, 1944, involving some 35 companies, including the Moore-McCormack Lines, was confronted with the objection by the companies that the Board had no jurisdiction for the reason that 'the United States, not the general agents, is the employer \* \* \*'. The panel pointed out that the W.S.A. had directed the steamship companies to negotiate contracts with the unions and that the N.L.R.B. had ruled that a general agent of the W.S.A. is the employer of the crews. Despite objection by the companies, the Board adopted the panel report and assumed jurisdiction over the case, deciding, among other things, that seamen remained subject to discharge by the agent steamship companies if not satisfactory to the companies, as well as fixing wages and working conditions to be adopted by the companies and unions as parts of their working agreements. Since then the War Labor Board has made several other decisions in disputes between the same steamship companies and the unions and has made further changes in wages and working conditions. For example, see *Pacific American Shipowners Assn.*, 14 L.R.R. 814 and 16 L.R.R. 790.

"Likewise, in the National Labor Relations Board case of *Barge Carriers, Inc.*, Case No. 10-C-1382, reported in *Lawyers Guild Review*, March-April issue, 1944, at page 38, the companies set up a similar defense, but the examiner held as follows:

"The acquisition by the W.S.A. of the vessels and the execution of the General Agency Agreement effected no change in the relationship between the respondent and the employees here concerned. Nor, despite the control exercised by the W.S.A. over the sailings and cargo of the vessels, has there been any change in, or attempt by the W.S.A. to change the working

conditions of the employees. Realistically, it is plain that the labor policies concerning these seamen are controlled entirely by the respondent, under only minimal supervision of the W.S.A. The creation of the W.S.A. and the vesting in it of control over the shipping of the United States was a temporary measure designed to utilize more effectively such shipping for the prosecution of the war. The control exercised by the W.S.A. over the respondent's operations has been concerned largely with voyages and cargo, and not with labor relations. In excepting the United States as an employer from the application of the (N.L.R.) Act, the Congress cannot have intended the exception to apply to a situation in which, for all practical purposes, the essential elements of the employer-employee relationship remain in the control of the private operator, under only nominal aid and temporary supervision of the W.S.A.' (Id. pp. 38-39).

As further stated in a later brief:

"Respondent states that the collective bargaining agreements with the unions were made when the company 'actually was an employer,' and that the War Shipping Administration 'modified them, insofar as employment was concerned', by the Statement of Policy, which referred to Section 3A(d) of the agency agreement.

"Since the Statement of Policy expressly continues in effect each and every provision of the union contracts between the unions and the companies, which were still to at least 'procure' the crews, it would follow that this would include a continuance of the employer-employee relationship unless it can be said that Article 3A(d) so clearly provided to the contrary that by accepting the



It is to be noted that the term "operation" is used without qualification along with maintenance and other duties imposed on the agent and ordinarily performed in connection with the operation of ships (see R. 54, 61, 62).

Article 6 deals with the selection of agents by the general agent and with the assignment of vessels by it to berth operators (R. 62). If the agent did not have at least some part in the control and operation of the vessels it obviously could not assign them to others. Moreover, the authority to select agents can have no meaning except in the discharge of the duties of the general agent under the contract, and there is thus no reason why it should not have designated agents among the officers of the ship, including at least the captain and purser, to discharge its duties while at sea or abroad.

Article 14 imposes the duty to maintain the vessel in an efficient state of repair and to exercise reasonable diligence in making inspections for that purpose (R. 67). No qualification is made to relieve the agent of this duty while the vessel is on voyage. The term "maintain" of itself connotes a continuing duty as is one normally incident to the operation of a ship.

Article 16 provides that the agent shall be indemnified for claims, including personal injuries, "connected with the operation or use of said vessels" (R. 67). Similarly, Article 8 provides for insurance of the agent against insurable risks of all kinds (R. 63). Even if it

be held that a provision for indemnity or insurance is not an admission of liability; it must be conceded that this provision could have no meaning unless the agent were intended to have at least some part in the operation of the vessel.

Merely because such operations are to be conducted in accordance with strict wartime Government orders and regulations cannot of itself defeat the responsibilities of the agent in connection with such operations any more than for any private company operating in time of war with Government owned equipment and under Government supervision. Likewise, the mere fact that the master is to have full control and responsibility for the "navigation and management of the vessel", as provided in Article 3A(d), does not contradict this fact, for the reason that under maritime law the master of a ship always has this power and responsibility, regardless of the person liable as owner or operator of the ship in the event of accident. Such a provision is even more natural in time of war and, if it has any special meaning, must have been intended to refer to laying the ship's course and to navigational problems arising under wartime conditions. Thus, such a provision is wholly immaterial to the issues of whether the agent was to take at least a substantial part in the operation of the ship.

This conclusion is even more conclusively established by Articles 11 and 12, dealing with termination of the contract, and which provide that the Government may

Administration include the power to cover the agents as well as the owners or charterers of the vessels. It has always been assumed that the agents do not have a liability which is separate or independent of that of the vessel owner or charterer. However, some recent decisions have given rise to the possibility that some agents may have an independent liability (*Quinn v. Southgate Nelson Corporation*, 121 F. (2d) 190 (C.C.A. 2d, 1941), certiorari denied, 314 U.S. 682; *Margaret M. Brady v. Roosevelt Steamship Company, Inc.*, 128 F. (2d) 169 (C.C.A. 2d, 1941). At the present time the War Shipping Administration may provide insurance for the interests of the owners or charterers of the vessels. The right to include the interests of agents is not specifically mentioned in the law but is believed to be implied therein. In view of the possibility that agents may have an independent liability it is desirable to amend section 3b of Public 101, Seventy-seventh Congress, to specifically include agents among those entitled to coverage under the Administration's insurance powers."

In Senate Report 62, 78th Congress, 1st Session, page 17, the following appears:

"Subsection (j) of section 3 would make it clear beyond controversy that the War Risk Insurance Act includes authority to provide insurance protection for agent operators as well as owners or charterers of vessels. The recent determination of the Supreme Court of the United States in *Margaret M. Brady v. Roosevelt Steamship Company, Inc.* (No. 269, October term, 1942, January 18, 1943), holds that there is such an independent liability in certain cases."



Statement of Policy embodying that article the unions expressly agreed to an abandonment of this relationship with the companies. As we have seen, however, no agreement by the unions to abandon this basis of the long established rights of their members under the Jones Act can be found in this masterpiece of legal equivocation (Pet. Br. 33-35; 41-43)." (Petitioner's Reply Br. pp. 11-12).

As held by this Court in the *Hust* case, however, the General Agency Agreement, including Article 3A(d), did not sever the employer-employee relationship between seamen and the private steamship companies (see Appendix B hereof).

## APPENDIX B

In *Hust v. Moore-McCormack Lines, Inc.*, supra, counsel for the steamship companies took the following position before this Court relative to the General Agency Agreement:

"That Service Agreement is the one which determines the status of the respondent Moore-McCormack Lines, Inc., in this case and defines its relationship to the vessel. We must look to it, therefore, to determine whether respondent was the employer of the crew on said vessel" (Respondent's Brief on the Merits, p. 5).

Having thus placed "all its eggs in one basket", figuratively speaking, it is of extreme significance to note the interpretation placed by this Court on this agreement in the *Hust* case, at pages 730 to 733, as follows:

"The mere fact that the terms of the standard agreement were changed to omit the provision for manning the ship and substitute the provisions relating to employees contained in the General Service Agreement was not, in these circumstances, enough to deprive seamen of that remedy. We do not think either Congress or the President intended to bring about such a result by the transfer of the industry to temporary governmental control. If this made them technically and temporarily employees of the United States, it did not sever altogether their relation to the operating agent, either for purposes of securing employment or for other important functions relating to it. Nor did it disrupt the long-established scheme of rights and remedies provided by law to secure in various ways the seaman's personal safety, either to deprive him of those rights altogether or to dilute or reduce them to the single mode of enforcement by the Suits in Admiralty Act procedure.

"This result is in accord with the spirit and policy of other provisions of the General Service Agreement. The managing agent selected the men, and did so by the usual procedure of dealing with the duly designated collective bargaining agent. It delivered them their pay, although from funds provided by the Government. It was authorized specifically to pay claims not only for wages, but also for personal injury and death incurred in the course of employment, for maintenance and cure, etc. It was responsible for keeping the ship in repair and for providing the seaman's supplies. For all of these expenditures not covered by insurance the contract purported expressly to provide for indemnity from the Government.

"With so much of the former relation thus retained and so little of additional risk thrown on the operating agent, it would be inconsonant not only with the prevailing law but also with the agree-

ment's spirit and general purpose to observe and keep in effect the seaman's ordinary and usual rights except as expressly nullified, for us to rule that he was deprived of his long existing scheme of remedies and remitted either to none or to a doubtful single mode of relief by suit against the Government in personam in admiralty. Our result also is in accord with the general policy of the Government and of the War Shipping Administration that those rights should be preserved and maintained, as completely as might be possible under existing law, against impairment due to the transfer."

### APPENDIX C

The following analysis of the standard general agency agreement demonstrates that the general agent had at least a substantial measure of control over the operation of the vessel.

Article 1 states that the general agent shall "manage and conduct the business of the vessels assigned to it," making it clear that, although acting as agent, the physical possession of the ships is turned over to the steamship company (R. 58).

Article 2 is to the same effect. It speaks also of the assignment of vessels to the agent and its acceptance of such vessels, making further clear an intent to transfer physical possession of the ships (R. 58).

Article 3A(a) imposes on the agent the duty of maintaining the vessel, subject to orders as to voyages, cargoes, rates and all matters connected with the use of the vessels or in the absence of orders to follow rea-



sonable commercial practice (R. 58). This makes it even clearer that the agent is to take at least a substantial part in the operation of the ship, subject only to orders from the Government, and that it was to exercise its discretion in the absence of such orders. Reference to "voyages" and to "use of the vessels" could have no meaning aside from operations during voyages.

Article 3A(d) provides that the general agent shall procure the master, subject only to approval by the Government (R. 59). Thus the agent is left free to designate its own employees as masters, remove them if they are not satisfactory and appoint successors, provided only that the successors are approved by the W.S.A. The fact that the master is to become an employee of the United States does not mean that he cannot at the same time be an agent for the company. Indeed, as a practical matter, the company could not discharge its duties under the contract, as discussed below, unless the master were its agent for these purposes.

Articles 3A(c), 4(a) and 7 refer to the maintenance of the vessels by the general agent, the keeping of records by it of the management, operation, conduct of business of such vessels, including statements of operation, and also provide that the Government shall reimburse the agent for all expenses, with certain limited exceptions, including expenses for the maintenance, management, operation or the conduct of the business of the vessels.

terminate the agreement and "assume control" of the ships, and that the ships "in the custody of the general agent pursuant to this agreement" shall then be "turned over" to the United States, although the agent may be required to complete the business of voyages commenced prior to the date of termination (R. 65). These provisions make clear the intent that until such time control over the physical custody of the ships was to be vested in the agent company. If the ships were being exclusively operated by the Government and not by the agent; the agent would not have their physical custody and could not "turn them over" to the party which was already operating them. Moreover, the provision that the agent may be required to complete the business of voyages undertaken prior to termination shows a clear recognition of this fact.

This conclusion is likewise supported by reference to the collective bargaining agreements between the steamship companies and Unions under which the companies assumed rights and duties that necessarily assumed that they were to take at least a substantial part in the operation of the ships at sea (see Plf. Ex. 1, 5, 6, 7, 8, 9 and 10, and Dft. Ex. A, included in the record, but not printed, R. 240).

## APPENDIX D

In H. R. 7424, 77th Congress, 2nd Session, Hearings on the Merchant Marine Omnibus Bill, September 2, 1942, the report of the hearings before the Committee on the Merchant Marine and Fisheries, page 17, the fol-

lowing appears as the statement of Admiral Emory S. Land, Administrator, W.S.A.; read by Mr. Radner:

"However, some recent decisions have given rise to the feeling that some agents may have an independent liability. At the present time the War Shipping Administration may provide insurance for the interests of the owners or charterers of the vessels while the right to include the interests of agents is not specifically mentioned in the law. In view of the possibility that agents have been said to have an independent liability which may not be covered by existing insurance it is desirable to amend section 3b of Public 101, Seventy-seventh Congress, to specifically include agents among those entitled to coverage. Section 3d of the proposed legislation would accomplish this objective by eliminating any doubt as to the status of the agent under the Administration's insurance powers.

"THE CHAIRMAN. In connection with the discussion of section 3d it is requested that the citations of the decisions referred to be supplied for the record in order that anyone desiring to do so may have recourse to them.

"MR. RADNER. We will be glad to supply them.

(The citations requested follow:)

*Quinn v. Southgate Nelson Corporation* (121 F. (2d) 190 (C.C.A. 2d, 1941), cert. denied 314 U. S. 682);

*Margaret M. Brady v. Roosevelt Steamship Company, Inc.* (128 F. (2) 169; C.C.A. 2d, 1941)."

In House Report 107, 78th Congress, 1st Session, pages 29-30, the following appears:

"Sec. 3(i) of the committee substitute is intended to avoid potential difficulty by specifically providing that the insurance powers of the War Shipping



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CHARLES ELMORE

IN THE

# Supreme Court of the United States

October Term, 1948.

No. 360.

FRED W. FINK,  
*Petitioner and Plaintiff-Respondent*  
*below,*

v.

SHEPARD STEAMSHIP COMPANY,  
a Corporation,  
*Respondent and Defendant-Appellant*  
*below.*

## Petitioner's Reply Brief.

B. A. GREEN,  
EDWIN D. HICKS,  
JAMES LANDYE,  
NELS PETERSON,  
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IN THE  
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v.

SHEPARD STEAMSHIP COMPANY,

A CORPORATION,  
*Respondent and Defendant-Appellant  
below.*

**PETITIONER'S REPLY BRIEF.**

Because the issue raised by the decision of the Court below involved only the interpretation of the Clarification Act, our brief was addressed primarily to that point. Respondent apparently has little confidence in sustaining the decision upon that ground, as is evidenced from its own statements made in the Court below, and now seeks to sustain the decision by a direct attack upon the Hust case. In support of this position, the Government repeatedly assumes innumerable facts and conclusions which have no support and are contradicted by the record itself. We are, accordingly, grateful for this opportunity of making reply.

At the outset, respondent represented to this Court that in the Hust case the general agent was held to be an operator because of an admission in the pleadings. Nothing could be farther from the fact. In the trial court, the case was decided from an independent examination of the General Agency Agreement and from other facts proven by the parties. The decision of that Court, holding the general agent to be an operator, was reversed by the Supreme Court of Oregon, which Court, in turn, was reversed



by the Supreme Court of the United States. The decision was based upon the interpretation of the same General Agency Agreement here involved, and the facts in that case. At no point was any consideration given to the fact that there may have been an admission in the pleadings of operation of the vessel, and that fact clearly did not play any part in the decision of the case.

In this case, the Oregon Supreme Court had occasion to pass upon this very point, and held:

"But it is argued by the Government that the instant case is to be distinguished from the *Hust* case for two reasons, first, because of an 'admission' in the answer in the *Hust* case that the defendant 'operated' the vessel, and, second, because the *Hust* case did no more than decide that the injured seaman was free to bring his action under the Jones Act and did not hold that the agent was vicariously responsible for the tortious acts of the master or boatswain, which is the negligence alleged here. We cannot agree. The admission in the answer in the *Hust* case was construed by this court to go 'no further than to admit operation of the vessel to the extent authorized by the agreement and to the exclusion of any control of the vessel or authority over the crew' (1945 A. M. C. 540, 176 Ore. 696). The alleged admission was not referred to in any of the opinions of the Supreme Court of the United States, and we can find nothing in the prevailing opinions which would indicate that it was relied on as a basis for decision. The other claimed point of difference does not exist, for the negligence in the *Hust* case was precisely the same character as that alleged here, namely, the negligence of the master, the boatswain, and perhaps other members of the crew (1945 A. M. C. 540, 176 Ore. 695). The Supreme Court of the United States so treated the case. The problem was one of vicarious responsibility (328 U. S. 712, 713, 724, 1946 A. M. C. 739)."

The Oregon Supreme Court also found from the Hust decision that the Master of the vessel, as well as the other members of the crew, were all employees of the General Agent, as follows:

"A careful reading of the (Hust) opinion convinces us that, so far as any question involved in this case is concerned, the Supreme Court of the United States thought and intended to hold that the Master of the vessel was an employee of the defendant no less than the plaintiff or any other member of the crew."

All seamen and their counsel likewise proceeded upon the understanding that the Hust decision had definitely settled the issue that the General Agent was an employer of the seamen and the actual operator of the vessel. In the instant case, the petitioner had instituted an action against the United States, as well as this action against the General Agent. After the decision in the Hust case, petitioner's counsel concluded that the suit against the United States was unnecessary for the protection of his rights, and within two weeks thereafter, that action was withdrawn, leaving only the suit against the General Agent. The same practice was followed in numerous other cases throughout the country, upon the same assumption, that the General Agent was the proper party to the suit.

In this case, the Government has not introduced any new evidence to support the facts or conclusions which it now draws, and the same arguments which it made here were most carefully considered by this Court in the Hust case and decided adversely to the respondent's position. The only new evidence in this and the other cases involved in this controversy tends clearly to sustain the decision reached by the Supreme Court in the Hust case. The delivery and re-delivery certificates in evidence in the Gaynor case, for example, prove beyond doubt that the physical possession of the vessels was turned over to the general agents for operation. Moreover, the testimony of the rep-

representative from the War Shipping Administration is further recognition of this fact by the Government itself, that the General Agent was the employer of the master as well as the crew, as follows (R. 119):

"By the Court: . . . if the master was going to be discharged, he would have to be discharged by the general agent, wouldn't he?

A. By the man who employed him.

The Court: That would be the general agent?

A. That would be the general agent."

So far as the actual operation of the vessel itself is concerned, the Government representative leaves no room for doubt in this connection, as follows (R. 119):

"Q. Mr. Settle, will you explain just in a general way the organization of the War Shipping Administration; that is, how it operates with field offices and divisions, and so forth.

"A. Well, the *actual operation* of the vessel has been *entrusted* to agents who have been appointed under the GAA contracts for the reason that the amount of work involved was so immense it was impossible for one organization to handle the entire matter."

Here is testimony from the people in the best position to know, from the very governmental agency involved, and this testimony is in direct contradiction to the representations made by Government counsel.

An examination of the Agreement itself and the conduct of the parties under the agreement discloses that the vessels were turned over to the general agents "lock, stock and barrel". At the oral argument, Government counsel contended that no possession or control passed to the general agent because the General Agency and Berth Agency contracts were identical, and no one has contended that the berth agent is an operator under its contract. This premise finds no justification whatever, as an examination of the



contracts will disclose. Note first that Articles 1 and 2 of the berth agency agreement carefully omit any reference to "management" of the vessels, as the general agent is required to do under the general agency agreement. Article 11 of the berth agency agreement provides that the Government may assume control of the "business" of the vessels after fifteen days' notice. Under the general agency agreement, Article 11 provides that the Government may terminate the agreement and assume control of the "vessels" themselves after due notice. Article 12 of the berth agency agreement provides that upon termination, "all property" in the custody of the berth agent shall be turned over to the United States. Article 12 of the general agency agreement provides that upon termination, "all vessels and other property" shall be turned back to the United States. Moreover, in the case of a berth agent, there are no delivery or re-delivery certificates, as is the case with the general agent when the vessels are turned over to the general agents and then returned to the Government at the termination of the contract. Article 3 of the berth agency agreement requires the performance of certain duties in connection with the handling of cargo and keeping the vessel supplied with provisions and other necessities, and other functions required by the vessel in port. On the other hand, Article 3 of the general agency agreement provides that the general agent must "maintain the vessels in such trade or service as the United States may direct", and "in the absence of such orders the general agent shall follow reasonable commercial practices". Among other things, Article 3 of this agreement requires the general agent to "equip, victual, supply and maintain the vessels", and to procure the master and crew. The "manning" of the vessel is done by the general agent under this agreement in precisely the same way that a private operator in peacetime procured a crew for a privately operated vessel. In this connection, it is significant to note that although the master is technically an employee of the United States, in actual practice,

he is an agent for the general agent. In the case of *Read v. Agwilines* (Civil Action No. 5603, E. D. Pa.), when the War Shipping Administration delivered the vessel to the Agwilines Company, the Captain accepted the vessel as agent for the Agwilines Company, and not as agent for the War Shipping Administration. With respect to the compensation provided by this article of the agreement, it is to be noted that the berth agents were paid in accordance with the services performed in port, while the general agent received compensation for each day that the agreement was in effect, whether the vessel was in any port or on the high seas. Article 7 of the berth agency agreement provides for the reimbursement of the berth agent for certain expenditures in connection with its duties, including sales and other similar taxes paid. Under the general agency agreement, in addition to these expenditures, the general agent is to be reimbursed for "all crew expenditures, including without limitation all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, *maintenance and cure*, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums required to be paid by law, custom or by the terms of the ship's articles or labor agreements . . . for the amount of any social security taxes which the general agent is or may be required to pay on behalf of the officers of the said vessel as agent or otherwise". These provisions demonstrate that the Government and the general agent contemplated that the latter would be responsible for all of these regular operating expenses, none of which are outlined or contained in the berth agency agreement. It is significant to note also that the parties contemplated and intended that the general agent would be held liable, *inter alia*, for *maintenance and cure*. This is an obligation which is imposed only upon an operator of a vessel and an employer.

Article 14 of the general agency agreement requires the general agent to exercise all reasonable diligence in making inspections and to arrange for the repair of the vessels covering the hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, including maintenance and voyage repairs and replacements. There is no comparable provision in the berth agency agreement, nor is the berth agent required to do any of the acts set forth in this article.

Article 16 of the general agency agreement, like article 8, involves an indemnification by the Government of the general agent for all liabilities arising out of the operation of the vessel, including that for maintenance and cure. This provision is again significantly omitted from the berth agency agreement.

These and other significant differences distinguish the general agency agreement from the berth agency agreement. The former is clearly an agreement for the operation of the vessel generally, while the latter relates only to the duties of a ship's husband while the vessel is in port. We submit that the respondent is clearly mistaken in its statement to the Court that the two agreements are identical or even analogous.

The record shows, as indicated on page 3 of our brief heretofore filed, that the general agents were operating these vessels under agreements covering all of the departments on board ship. These included agreements with the Masters, Mates and Pilots, the Marine Engineers, and the unlicensed personnel; and they covered every man on the ship from the Captain down to the lowest mess boy. These same agreements provided for the working conditions, wages, duties and other responsibilities in connection with the operations of the vessels. The record shows that all complaints and disputes were taken up with the general agent, and not with the War Shipping Administration, as erroneously alleged by the respondent. Petitioner's Exhibit 11 (R. 70-75) is concerned with intimate details involving the internal management of the vessel in port and



at sea. Complaint No. 1 is concerned with the question as to whether the Firemen's Union or the Steward's Department had the burden of handling ice on board the vessel. Complaint No. 2 relates to the method of serving meals. Dispute No. 3 required the general agent to determine whether the Master had the right to have his meals served in his room or in the dining hall. Note that it is the general agent who fixed the policy governing the internal management of the vessel even with respect to such intimate details. The remainder of the complaints are along the same line, and it is interesting to note that the general agent's representative referred to the masters as "their masters".

The status of the General Agent as an operator is further illustrated by the negotiations with the various governmental agencies, including the War Shipping Administration and the War Labor Board. In 16 W. L. B. reports 23, a controversy was presented between the general agents and the seamen regarding working conditions and wages and hours. The record shows that a representative of the War Shipping Administration discussed the matter with a union representative and advised that he would "recommend" to the general agents the adoption of an agreement. This representative then withdrew and stated that the agreement would have to be reached through the regular processes with the general agents. Later on, Admiral Land attempted to use his "good offices" to work out the agreement, but met with much difficulty from the general agents. The record is dispositive that the authority was vested in the general agents as though they were an operator in private enterprise. Had the Government been the actual operators, it is to be anticipated that the Administrator would have issued a direct command, rather than a "recommendation" and the use of his "good offices".

Nor did the general agents make any secret of the fact that they were actually the operators of the vessel and employers of the crews. In *Wright v. Eastern Steamship*

*Lines* (D. C. S. D. N. Y., Adm. No. 152), the general agents obtained a policy of insurance from the Indemnity Insurance Company of North America, and as indicated in the letter set forth on page 23 of petitioner's brief in the *Gaynor* case, the insurance company issued a policy of insurance covering the *captains* and *crews* of the vessels as *employees of the general agent*. In the *McAllister* case, the record discloses that the general agent furnished the personnel on the vessel with various forms, including medical reports, on which it appeared that the general agent was designated as the "*employer*" of the seamen. (Exhibit 4, R. 559). In the *McAllister* case, the officers and unlicensed personnel testified that they were engaged by and considered themselves to be in the employ of the general agent (R. 104-109, 51, 89, 90, 323, 371). Very significant also is the fact that all vessels were authorized to carry the *stack markings* of the general agent, as provided by Operations Regulation No. 111. This was notice to all the world that the vessels were being operated by the general agents.

It is appropriate here to consider the illustration offered by the respondent at the oral argument. It was suggested to the Court that if someone should slip upon the steps of the Court building, that Mr. Waggaman, as an employee of the Government, could not be held personally liable. While we have no quarrel at all with this contention, the illustration does serve to point up the issue here involved. Mr. Waggaman is not an agent of the Government in the sense that the general agent was an agent of the Government. On the contrary, Mr. Waggaman is a part of the Government itself, and his actions are the actions of the Government. The situation would be comparable if the Government engaged a separate agency to maintain and operate the building, under which circumstances that agency would undoubtedly be responsible for the improper maintenance or operation of the building under its charge. Similarly, the general agents are certainly not employees of the

Government, though they may be acting for the Government.

It is pertinent to point out that the Government exercised the same kind of control over many private industries, such as shipbuilding, aviation companies, and other similar businesses, engaged in the war effort. Those enterprises were likewise operated under strict regulations of the Government, and were subject to rigid control. In the instant cases, it is not our view that the Government was divorced from the operation of these vessels. On the contrary, the Government did reserve to itself the right to supervise and generally control the entire Merchant Marine, and, in point of fact, the Government was technically, as this Court pointed out in the *Hust* case, an employer of the seamen. However, as this Court further pointed out in the *Hust* case; that is not to say that the operating agent was not also liable as an operator and employer. A quotation from the case of *Armit v. Loveland*, 115 F. 2d 308, is peculiarly appropriate at this point, as follows:

"If the defendants so scrambled their relations as to render it difficult for anyone to say for a certainty whether the plaintiff was employed by only one or by all of them, that should not serve to defeat the plaintiff's right by relieving a responsible defendant. To hold otherwise would be to put a premium upon the confusion which the defendants themselves created. The ones responsible for it should be the ones to dispel it, which they can do by adjusting their respective liabilities inter se. In the circumstances here present we can see no legal necessity for requiring the plaintiff to grope around in search of his employer's identity among corporate entities and individuals, all of whom are shoots off the same stock and engaged in a common activity. A verdict against all three defendants was warranted. *Lang, et al. v. Hanlon, et al.* 302 Pa. 173."



We respectfully submit that, regardless of any control or supervision exercised by the Government in the operation of the Merchant Marine, it is clear that the general agents exercised a substantial measure of control over the vessels and the seamen, and they are, therefore, necessarily responsible as operating agents, as this Court held in the *Hust* case, for all incidents arising out of the vessels' operations.

Respectfully submitted,

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NO. 500

In the Supreme Court of the United States

OCTOBER TERM, 1943

FRED W. FINK, Petitioner

v.

SEASIDE STEAMSHIP COMPANY

On Petition for a writ of Certiorari to the Supreme  
Court of the State of Oregon

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1948**

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**No. 360**

**FRED W. FINK, *Petitioner***

**v.**

**SHEPARD STEAMSHIP COMPANY**

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**On Petition for a Writ of Certiorari to the Supreme  
Court of the State of Oregon**

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**MEMORANDUM FOR THE RESPONDENT**

During World War II the United States, upon the organization of the War Shipping Administration in February 1942, took over the direct physical operation of the government-owned merchant fleet. It terminated the various forms of bareboat charters and operating agency agreements under which the Maritime Commission had previously demised government vessels for private operation by bareboat charterers and operating agents who as owners *pro hac vice* in possession and control,

manned, navigated and physically managed the vessels as their own. It replaced this peacetime method of operating government-owned vessels by direct government operation, employing three distinct and independent types of agents among whom it distributed the various duties. To man, navigate and physically manage the vessels, the War Shipping Administration employed experienced ship masters, officers and crews who were subject to its exclusive control and were technically unclassified civil service employees of the United States. To manage and conduct the procurement and loading of cargo and to render other berth and port services to its vessels, it employed shipping operators having existing berthing and stevedoring facilities whom it designated as berth agents. To manage and conduct the accounting and certain other shoreside business of the vessels, it employed other experienced shipping operators as ships' husbands or general agents, but excluded them from any authority or control whatever over the physical operation of its vessels and the civil-service masters, officers and crews through whom the Government manned, navigated, managed and operated its vessels.

A small number of third parties, such as seamen, longshoremen, ship repairmen and passengers, who have been injured as a result of negligence of the Government's masters and crews in the navigation and management of its vessels, have brought suit against various government agents instead of

suing the United States as their disclosed principal. The question of whether such shoreside business agents are liable to these third parties for the independent negligence of the Government's employees in operating the vessels has been twice before this Court, with varying results. *Hust v. Moore-McCormack Lines*, 328 U. S. 707; *Caldarola v. Eckert*, 332 U. S. 155. In the *Hust* case it was held that the agents might be deemed operating agents or owners *pro hac vice* in possession and control and were liable as such. In the *Caldarola* case it was held that the agents were not owners *pro hac vice* or operating agents in possession and control so as to be, for all practical purposes, liable as owners of the vessels.

The decision of the court below presents the question whether a civil service employee of the United States serving as a seaman on such a government-owned and operated vessel has his sole remedy under the Jones Act (41 Stat. 1007; 46 U.S.C. 688), for injuries resulting from the negligence of the government-employed master and crew of the vessel, by suit in admiralty against the United States pursuant to the Suits in Admiralty Act (41 Stat. 525; 46 U.S.C. 741 *et seq.*), or whether he may, at his election, also recover by a suit at law, against the ships' husband or general agent which acted for its disclosed principal, the United States, only in respect of certain shoreside business operations of the vessel, but had no authority or control



over the work of the seaman or the operation of the vessel and which neither caused the injuries nor owed any duty whatever to prevent them. The court below held that in the instant case the government-employed seaman had no such right of election.

The court below conceived the question as involving two issues: (1) Whether this Court's decision in *Caldarola v. Eckert*, 332 U. S. 155, 159, that the Government's agent was not in possession and control of the vessel as owner *pro hac vice* or operating agent, modified its previous holding in the *Hust* case that as operating agent or owner *pro hac vice* in possession and control the agent was liable for the negligence of the master and crew; and (2) whether this Court's decision in the *Hust* case, that the War Shipping Administration (Clarification) Act of March 24, 1943 (57 Stat. 45; 50 U.S.C. App. 1291) gave civil service employees of the United States serving on War Shipping Administration operated vessels a right of election to sue agents of the Government on causes of action arising prior to its enactment, applied equally to causes of action, like the present, arising after the effective date of the Act. The court below decided that the *Caldarola* decision had not modified the *Hust* case, but that, on the other hand, the *Hust* case indicated that the Clarification Act, far from giving such a right of election in cases after its effective date, made suit against the United States petitioner's exclusive remedy.

1. The holding of the court below, that this Court's decision in *Caldarola v. Eckert*, 332 U. S. 155, 159, did not modify the *Hust* case, is in conflict with the holding of the Court of Appeals for the Third Circuit in *Gaynor v. Aguilines*, 169 F. 2d 612, 618, now pending on petition for a writ of certiorari, No. 162 Misc., this Term. The *Caldarola* case recognizes that *Hust* established the right of the seaman to bring the statutory action under the Jones Act against the Government's agent; but, as the dissenters in *Caldarola* pointed out, the reasoning in the *Caldarola* case follows that of the dissent in *Hust*, in holding that the agent is not liable as owner *pro hac vice* or operating agent of the vessel.

Since the *Caldarola* decision establishes that the Government's shoreside business agents are not owners *pro hac vice* or operating agents, the court below plainly erred in refusing to apply this Court's decisions in *Denton v. Yazoo & M. V. R. R. Co.*, 284 U. S. 305, 308-309, and *Brady v. Roosevelt S. S. Co.*, 347 U. S. 575, 584-585. Under settled principles, recognized in those cases, the vicarious liability of the ships' husband or shoreside business agent of the Government was confined to the torts of persons doing its shoreside work, and did not extend to the negligence of the Government's masters and crews who were doing work of the United States in the physical management and operation of its vessels which was not subject to the shoreside agent's supervision or control. The ships'

husband or shoreside business agent of a private principal under the same form of agreement would not be held liable, and no reported case indicates even an attempt to impose the liability of an operating agent or owner *pro hac vice* on the husbanding agent of a private shipping operator. It goes without saying that, even if a husbanding agent may, because of his activities in procuring seamen for employment by his principal, be deemed their "employer" as regards the institution of a Jones Act suit (see 332 U. S. at 159), still the seamen's work is not the agent's as it must be to impose vicarious liability on the agent under such statutes. Cf. *Chicago, R. I. & P. Ry. Co. v. Norman*, 165 Okla. 133.

2. Despite the contrary holding of the Court of Appeals for the Second Circuit in *McAllister v. Cosmopolitan Shipping Co.*, 169 F. 2d 4, 8. (now pending on petition for a writ of certiorari, No. 351, this Term), we believe that the court below held correctly that in a case like the present, arising after the effective date of the Clarification Act, petitioner does not have the election to enforce his Jones Act rights either against the United States or the agent which this Court held was available to *Hust* under the retroactive provision of the Act. *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 728-730.

The *Hust* case involved injuries occurring before the passage of the Clarification Act. The

opinion explicitly left open the question as to the effect of the Clarification Act upon injuries occurring after its enactment (328 U. S. 727, 732), which is the question we have here. Absent the right of election conferred by the retroactive clause, it is obvious that petitioner, a civil service employee of the United States, has no right to recover from the Government's shoreside business agent for the negligence of the Government's master and crew in doing work of the United States in respect of which the agent had no authority or control. Indeed, Congress in the Clarification Act declared its purpose in no uncertain terms to grant government seamen the power to enforce these rights only through the Suits in Admiralty Act. Congress intended that for the future the rights of government seamen were to be measured by those of seamen privately employed rather than by those of other government employees, but the enforcement of these rights was necessarily restricted to suits against their employer, the United States. Had Congress regarded the Government's civil service seamen as employees of the Government's agents, the Clarification Act would have been superfluous. In the language of the court below, "It would have been wholly unnecessary to accord to seamen in private employment the rights of seamen in private employment" (R. 28).

While we believe that the final result reached by the court below is correct, its error in respect of



the interpretation and application of this Court's decisions in *Caldarola v. Eckert*, 332 U. S. 155, 159, and *Denton v. Yazoo & M. V. R. R. Co.*, 284 U. S. 305, 308-309, and its conflict with the decisions in the *Gaynor* and *McAllister* cases (No. 162 Misc. and No. 351, this Term), are such as to render appropriate review by this Court. For these reasons, we do not oppose the granting of the writ of certiorari in this case.

PHILIP B. PERLMAN,  
*Solicitor General.*

November 1948

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No. 360

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1948**

**FRED W. FINK, PETITIONER**

**v.**

**SHEPARD STEAMSHIP COMPANY**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF OREGON**

**BRIEF FOR RESPONDENT**

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---

## BRIEF FOR RESPONDENT

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### OPINIONS BELOW

The trial court's opinion of September 16, 1946 (R. 173-178), denying respondent's motion for nonsuit, is reported at 1946 A. M. C. 1333. Its final opinion of October 5, 1946, denying respondent's motion for judgment notwithstanding the verdict or for a new trial (R. 8-9) is not reported. The opinion of the Supreme Court of the State of Oregon (R. 11-35) is reported at 192 P. 2d 258 and its opinion on rehearing (R. 39-40) at 193 P. 2d 537.

### JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered April 6, 1948 (R.



35). A petition for rehearing filed May 14, 1948 (R. 35), was denied May 18, 1948 (R. 41). The time to petition for a writ of certiorari was extended by successive orders of this Court to and including October 18, 1948 (R. 239). The petition for a writ of certiorari, filed October 18, 1948, was granted November 22, 1948 (R. 242). The jurisdiction of this Court rests upon 28 U. S. C. 1257 (3).

#### QUESTION PRESENTED

During World War II the United States, on the organization of the War Shipping Administration in February 1942, took over the direct

<sup>1</sup> On the same day, this Court also granted certiorari in No. 351, *Cosmopolitan Shipping Company v. McAllister* and No. 430, *Gaynor v. Aguilines, Inc.*, and set the three cases down for hearing immediately following No. 179, *Weada v. Dickmann, Wright & Pugh* in which certiorari had already been granted, and which, like these three cases, also involves the question of the liability of general agents of the former War Shipping Administration. The Solicitor General appears for respondent general agent in this case and for the general agents in the other cases because, in accordance with the wartime general agency agreement between respondent and the War Shipping Administration, the United States is obligated for any recovery effected to the extent not covered by insurance (W. S. A. Form GAA 4-4-42). On the standard form insurance which is obtained, the United States in effect assumes the reinsurance of the most substantial part of all losses. House Merchant Marine and Fisheries Committee, Doc. No. 4, *Compilation of Standard Contract Forms of the War Shipping Administration*, p. 847. The defense of such actions is assumed by the Department of Justice whenever it appears to be required by the public importance of the question involved.

physical operation of the government-owned merchant fleet. It terminated the various bare-boat charters under which the Maritime Commission had demised the Government's vessels for private operation by charterers who, as owners *pro hac vice* in possession and control, manned, navigated and physically managed the vessels as their own. It replaced this prior peacetime method of private operation by direct government operation of the vessels, employing three independent types of agents, among whom it distributed the various operating duties. As its agents afloat, to man, navigate, and physically manage and operate the vessels, the War Shipping Administration employed experienced ship masters, officers and crews, who were subject to its exclusive control and were technically unclassified civil service employees of the United States. As its agents ashore, to operate the accounting and certain other shoreside business of the vessels, it employed experienced shipping operators as ships' husbands or general agents, but excluded them from any authority or control over the operation of the vessels themselves and the masters, officers and crews by whom the Government directly manned, navigated, managed, and operated its vessels. As agents to manage and conduct the loading of cargo and to render other berth and port services to its vessels, it employed shipping operators having existing berthing and stevedoring facilities. Various third parties, such as crew

members, longshoremen and passengers, injured as a result of the negligence of the Government's masters and crews in the navigation and management of its vessels, have brought suit against the shoreside business agents.

The question for decision is whether, with respect to causes of action arising after the effective date of the War Shipping Administration (Clarification) Act of March 24, 1943, these shoreside business agents, such as respondent here, are liable to third parties, such as petitioner, for the acts of the Government's civil service master and crew in doing work which was not assigned to such shoreside agents nor subject to their authority or control, but was exclusively work which the United States, as disclosed principal operating the vessels, had assigned to the master as its independent agent and employee.

#### **STATUTES AND REGULATIONS INVOLVED**

The statutes and regulations involved, *i. e.*, the War Shipping Administration (Clarification) Act (57 Stat. 45, 50 U. S. C. App. 1291), the Jones Act (41 Stat. 1007, 46 U. S. C. 688), the Federal Employers' Liability Act (35 Stat. 65, as amended, 45 U. S. C. 51) and R. S. 1753 (5 U. S. C. 631), together with certain applicable Civil Service Rules and War Shipping Administration Operations Regulations, are set forth in Appendix A of the Brief for the Petitioner in

No. 351, *Cosmopolitan Shipping Company, Inc.*  
v. *McAhist*.

STATEMENT

The undisputed facts out of which the injuries complained of arose may be readily summarized from the narrative statement stipulated below (R. 178-179, 187). Petitioner, Fred W. Fink, was a War Shipping Administration seaman on its S. S. *George Davidson*. While the ship was off the coast of Tasmania, petitioner was ordered by his superiors, the master and boatswain, to empty a garbage can overboard. Although a heavy sea was running and it was necessary to lift the can, which weighed some 150 pounds, over a rail nearly four feet high, they assigned no other crew member to assist petitioner. While he was attempting to empty the can, the roll of the ship caused it to be thrown backward against him; he slipped and fell with the can and sustained the injuries involved. The evidence of damages and injuries were stipulated to be sufficient to sustain the verdict and judgment for \$9,000 (R. 187).<sup>2</sup>

<sup>2</sup>The facts concerning petitioner's employment may be quickly summarized: Petitioner Fred W. Fink signed shipping articles with the master of the S. S. *George Davidson* at the port of Portland, Oregon (Vancouver, Washington), on June 8, 1945, for a foreign voyage, in the capacity of able seaman (R. 212). The *Davidson* was a vessel owned by the United States and operated by the War Shipping Administration; she was newly built by the Maritime Commission and this voyage was her first (R. 141, 182). Respondent



Petitioner, in compliance with the requirements of the War Shipping Administration (Clarification) Act of March 24, 1943 (Public Law 17, 78th Cong., 1st sess., c. 26, 57 Stat. 45, 50 U. S. C. App. 1291), filed claim on account of his injuries with the War Shipping Administration, Washington, D. C., and brought suit against the United States pursuant to the Suits in Admiralty Act (R. 105).<sup>3</sup> Petitioner also brought the present action in the Circuit Court of the State of Oregon for the

Shepard Steamship Company was employed by the United States as ship's husband or general agent to operate her shoreside business in accordance with the wartime standard form of husbanding agreement GAA 4-1-42 and "such directions, orders or regulations" as the Government might prescribe (R. 58).

Petitioner was furnished by the union hiring hall, apparently on request of the master of the *Davidson* for employment by him on behalf of the United States (R. 101, 87). Petitioner was not informed by the hiring hall or anyone else as to who was operating the vessel (R. 104). The shipping articles on which petitioner was employed listed the "Registered Managing Owner" of the *Davidson* as "War Shipping Administration" with address at Washington, D. C., and respondent on the line below as "Shepard Steamship Co. (Gen. Agents), 40 Central St., Boston, Mass." as its general agent (R. 211). The name Shepard Steamship Company did not appear anywhere on the vessel and petitioner never received any written communication from them or anyone else; his discharge was signed by the master (R. 103-104, 81). He was paid by the master in cash (R. 102).

<sup>3</sup> *Fred W. Fink v. United States of America and Shepard Steamship Co.*, U. S. District Court, District of Oregon, Civil No. 2931. This admiralty suit was later dismissed without prejudice.

County of Multnomah against respondent Shepard Steamship Company alone (R. 1). The amended complaint sought damages under the Jones Act (Merchant Marine Act, 1920, 41 Stat. 1007, 46 U. S. C. 688) in excess of \$25,000, alleging respondent "was in possession of, controlled, navigated, managed and operated" the *Davidson*; that respondent "was reckless, careless and negligent" in directing petitioner "to empty said garbage can when there was a heavy sea running" and "to lift and maneuver said heavy garbage can, taking into consideration the weight and bulk of the same", and further in "neglecting to have sufficient workmen to perform said task"; and that as a consequence petitioner suffered pain and injury (R. 1-3). Respondent's answer denied it possessed, controlled, navigated, managed, or operated the *Davidson* or employed petitioner; denied its negligence; and prayed that petitioner take nothing (R. 3-4).

The trial court, by stipulation of the parties, first conducted a preliminary hearing on the question of whether petitioner had the right to bring suit under the Jones Act, and thereafter, sitting with a jury, heard the case on the merits (R. 83-85). Motions for a nonsuit at the close of petitioner's case (R. 172), and for a directed verdict at the close of the trial (R. 183) were denied (R. 180, 183). The jury were instructed, over respondent's objections, "that the officers of the

ship, including the captain, mates, and boatswain, were agents" of respondent for the purpose of the case, and "if they were in any way guilty of negligence such negligence would be imputed" to respondent who would be liable therefor (R. 185). A verdict for petitioner was returned (R. 4), a motion for judgment notwithstanding the verdict or for a new trial (R. 6) was denied (R. 7), and judgment was entered on the verdict (R. 5). On appeal, the court below reversed (R. 35), holding that for negligence of the government-employed master and crew of a government-operated vessel occurring subsequent to the enactment of the Clarification Act, petitioner's exclusive remedy was by suit against the United States under the Suits in Admiralty Act (R. 11-35).

The opinion below recognized that *Caldarola v. Eckert*, 332 U. S. 155, differed from *Hust v. Moore-McCormack Lines*, 328 U. S. 707, in holding both that agents employed by the Government under the GAA 4-4-42 husbanding agreement are not owners *pro hac vice* or operating agents, and that the liability of a government agent for his own torts under *Brady v. Roosevelt Steamship Co.*, 317 U. S. 575, is not conclusive of his liability for the torts of other independent government agents and employees (R. 19-20). But it preferred to rest its decision on the effect of the Clarification Act, noting that this Court's discussion in the *Hust* case "left open the question whether the Clarification Act,

in its application to claims arising after the act became effective, deprived seamen of the right to sue the General Agent under the Jones Act as their employer, and there is no binding declaration of that court on that subject" (R. 24). The Oregon Supreme Court then held (R. 28), that the act "speaks in no uncertain terms" of the congressional intent that as government employees such seamen were to have "the same rights they would have had in private employment, though not the same remedies", and concluded (R. 28):

\* \* \* Although General Agents are not mentioned, the context of the section, as well as the legislative history, excludes the notion that they were to be regarded as employers of such seamen and liable to suit as such for the causes mentioned. Had that been in the mind of Congress, there would have been no reason for the provision regarding claims for injury and death, since, as employees of the General Agent, the seamen, without any additional legislation whatever, would have had the right to sue the agent under the Jones Act with the right to a jury trial. It would have been wholly unnecessary to accord to seamen in private employment the rights of seamen in private employment.

#### ARGUMENT

Petitioner, a government-employed merchant seaman, brought two suits to recover for the neg-



ligence of his superiors; the master and boatswain, who like himself were civil-service employees of the United States, serving on a vessel of which the War Shipping Administration was operating owner in possession and control. One was a suit in admiralty pursuant to the Suits in Admiralty Act against the United States and respondent Shepard, a general agent or ship's husband employed by the Government to operate the accounting and certain other parts of the vessel's shore-side business. The other, now brought to the bar of this Court, was a suit at law in an Oregon state court against respondent Shepard alone. Petitioner's counsel dismissed the admiralty suit against the United States without prejudice, and brought the present suit to trial before a jury. The court below, reversing the judgment of the trial court, held that petitioner's exclusive remedy for the negligence of his superior officers, occurring after the enactment of the Clarification Act, was, by suit against his employer, the United States, pursuant to the Suits in Admiralty Act.

The Brief for the Petitioner in the companion case of *Cosmopolitan Shipping Co. v. McAllister* (No. 351, this Term) fully develops the reasons and authorities which establish the correctness of the decision below. Here, it will be sufficient to deal briefly with certain special contentions found in this petitioner's brief, as well as to summarize pertinent testimony in this record on the functions and duties of a general agent.

1. In an oblique attack upon this Court's holding in *Caldarola v. Eckert*, 332 U. S. 155, 159—that general agents employed under the GAA 4-4-42 husbanding agreement to “operate” the accounting and certain other “business” of WSA vessels are not owners *pro hac vice* or operating agents—petitioner argues that the *Hust* case has established that the master and crew of such vessels, civil service employees of the United States, are in some sense “employees” whose negligence is attributable to the agents when the agents are sued under the Jones Act (Br. 7-13). Petitioner asserts that such a status is further supported by (1) the action of WSA respecting their collective bargaining agreements, (2) WSA's practical arrangements with the National Labor Relations Board and the National War Labor Board, and (3) the provisions of the GAA 4-4-42 husbanding agreement itself (Br. 9-11). Our brief for the petitioner in No. 351 shows (in Point III) that these factors, on the contrary, establish that the United States, and not its agents, was operating owner in exclusive possession and control of its vessels and the exclusive employer of its masters and crews, while its general agents were solely agents for its shoreside business.

We leave to the brief in No. 351 the discussion of the terms of the agency contracts, the regulations, and the other factors which show the correctness of the holding in *Caldarola* that the general agents were not operating agents or owners *pro*

*hac vice*. But we desire to buttress our arguments in that brief with a summary of the actual functions of the general agent in performing its duties, as testified to in this case by Mr. Earl Sanders, respondent's acting manager in the Northwest:

Prior to the war, respondent Shepard was an owner of vessels and operated its own ships as a common carrier in the inter-coastal trade, soliciting cargoes directly or by its own agents, and receiving the earnings of the vessels and bearing their losses (R. 110). It did not operate in any foreign trade except on one or two occasions when it time chartered its vessels for someone else's service; it never operated to Australia or India, the route of the *Davidson* (R. 111).

Respondent's wartime services as agent under the general agency agreement were far different from these peacetime activities as owner; the ship was owned by the Government and under the agency agreement respondent was to "procure" the master, subject to the approval of the United States, who then became "an agent and employee of the United States," with "full control, responsibility and authority with respect to the navigation and management of the vessel" (R. 111, 59, Ex. 4, Art. 3 A (d)). It would locate a master whom it knew, or get one through the union or the Recruitment and Manning Organization of WSA (R. 112). WSA operated training schools for the officers whom it employed; and this func-

tion was carried on by the division of WSA known as the R. M. O. (the Recruitment and Manning Organization) (R. 112-113). An applicant for the job of master or officer on a WSA operated vessel had to fill out an application form (giving his record of service) which was captioned "War Shipping Administration, Division of Operations, Service Record", and this record was sent to WSA for approval before the master or officer was employed (R. 112-113, 80, Ex. G). Once employed by WSA, all that was necessary for an officer to do to be transferred to another WSA vessel was to submit a transfer form; being a WSA employee, he could transfer to other vessels, for which different companies were general agents, merely by furnishing the transfer form; he did not change his employment by transfer from one vessel to another, and did not need to make a new application, as if he were obtaining new employment (R. 113-115).

When a new ship was being completed, the general agent would maintain contact with the shipyard as to the delivery date, checking as to the quantity of stores that would be furnished (R. 116). Meanwhile, WSA, through its Washington office, would direct that the licensed crew could be employed a certain number of days prior to scheduled delivery (R. 116). WSA would also appoint a berth agent, and issue directions to the general agent as to the service the vessel was to enter (R. 77-78, Ex. H). The general agent did not select the



berth agent; WSA designated the berth agent in line with its policy of assigning berth agencies to operators which prior to the war had maintained a regular berth service over the route of the voyage to be made (R. 117, 77, 198, Exs. H. and D). Respondent Shepard was not a berth agent for the *Davidson*; indeed, it was not even qualified to be a berth agent for this vessel, because it had never maintained a service in the area to which the *Davidson* voyaged (R. 119). American President Lines, which had operated in peacetime on the route to be made by the *Davidson*, was appointed berth agent for the ship and signed the bills of lading for the United States (R. 154, 77-78, Exs. H, I). The general agent had nothing to do with determining where the vessel would go, or in what service it would be operated, nor with soliciting or loading cargo or with collecting freight, when freight was involved; these things were functions of the berth agent (R. 117-118, 145). The general agent arranged for docks, pilotage, and so forth, only during the period prior to the time the vessel went to its loading berth. After that, the Army or Navy, or the berth agent, performed these functions (R. 153). The general agent performed the duty of storing and supplying the ship; all purchases were made in the name of the United States, and no sales tax was paid on purchases since they were really purchases by the United States (R. 145-146). With respect to reimbursement of the agent, the agency

agreement was departed from in actual practice, pursuant to government regulations, because reimbursement proved too slow, so the WSA supplied its agents with a revolving fund, from which the agent reimbursed money for the account of the vessel (R. 146-148).

WSA instructed respondent to continue its crew procurement operations in accordance with its prewar collective bargaining agreements with the various maritime unions and to negotiate new agreements<sup>9</sup> (R. 137-139; cf. 188-197). In the new bargaining agreements respondent, like other general agents while representing the WSA was in turn represented, pursuant to WSA instructions, by the Pacific American Shipowners Association (R. 138, cf. 162-170). And the resulting general agreements were signed "Pacific American Shipowners Association, J. B. Bryan, President, acting on behalf of the following member companies, in their capacity as general agents, War Shipping Administration" (Ex. 5; cf. R. 138). As general agent it procured the crew on requisition of the master, as provided by Article 3 A (d) of the GAA 4-4-42 agreement—which meant in practice that the agent found out from the master when he wanted his crew, and ordered a crew through the union hiring halls (R. 149-150). The agent did not interview the crew members as to their qualifications nor even

see the men, and if a man reported drunk or otherwise unfit, it was the master's responsibility to reject him, for the agent had no right or duty to reject him (R. 149-150). While the general agent selected the master for the United States, it had no right on its own initiative to fire the master, but was required to report any serious violations or unfitness of the master to WSA or to the Coast Guard (R. 150-152). Before the war, Shepard, when operating its own ships, could fire a master if "they just didn't want him handling their affairs" (R. 152-153). The general agent gave the master no instructions as to where to go, nor how to navigate or manage the vessel, while before the war Mr. Shepard, as owner, used to give the masters strict instructions as to such things as the "balance of economy between excessive speed and wearing out a ship" (R. 155-156).

The general agent had the duty of arranging for fueling the vessel for her voyage; instructions on this matter came from the District Marine Superintendent of WSA at San Francisco (R. 156). After a vessel left port, the functions of the general agent were primarily accounting—paying bills, and making reports for the WSA auditors (R. 157). When the vessel reached foreign ports, the general agent had nothing to do with her (although in some instances the berth agent would attend her), but WSA had its own employees as port representatives in most

foreign areas (R. 157-158). Upon the vessel's return, the general agent would assist the master and purser in making up the pay roll and the money to pay off the crew was wired directly to the master from the agent's revolving bank account of WSA funds (R. 159-162).

We submit that this testimony of a witness thoroughly familiar with the practice under the GAA 4-4-12 agreements is enough, of itself, to contradict petitioner's claim that general agents, such as respondent, were "operating agents" in possession and control of the Government's vessels, and establishes clearly that they were mere ships' husbands operating only the vessels' shore-side business.

2. The core of petitioner's contention is that liability of a general agent under the Jones Act may exist despite a complete absence of vicarious liability under the normal rules of law (Br. 16-20). Petitioner repeatedly invokes this Court's decision in *Hust v. Moore-McCormack Lines*, 328 U. S. 507, as establishing such a principle (Br. 14, 18, 20). He ignores, as an "attempt at hair-splitting" (Br. 17), the Court's holdings that the right to bring an action against a defendant is not conclusive of the "different question" whether "a cause of action" against the agent has been established, i. e. whether the agent is liable (*Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, 583; and *Caldwell v. Eckert*, 332 U. S. 155, 159-160).

But in fact while in *Hust* the Court had held,



on a limited record, that general agents employed by the United States under the wartime GAA 4-4-42 husbanding agreement were "operating agents" or "private operators" of the Government's vessel (328 U. S. at 717, 720, 721, 724, 725, 730, 732)—so that, as such operators were akin to owners *pro hac vice*, they were vicariously liable to third persons for the negligence of the master and crew; but the Court subsequently held in *Caldarola* that they were not owners *pro hac vice* or operating agents—and therefore not liable to such third persons (332 U. S. at 159). And it is elementary that the basis of vicarious liability in a Jones Act suit must be the negligence of some individual who was performing work of the defendant and over whom the defendant exercised control. See Point IV in the Brief for the Petitioner in No. 351, pp. 102-113.

This removal by *Caldarola*, of what was the foundation of the agent's liability in *Hust* is, we submit, dispositive here, for the respondent general agent cannot be liable for the negligence of the Government's employees while doing work which the United States, as disclosed principal operating the vessels, had assigned exclusively to the Government's shipmaster as an independent Govern-

<sup>1</sup> Cf. *Cory, Lukes & Co., Inc. v. U. S. Shipping Board Emergency Fleet Corp.*, 237 N. Y. 376, 383; *U. S. Shipping Board Emergency Fleet Corp. v. Greenwald*, 16 F. 2d 948, 254 (C. A. 2); *Stewart v. U. S. Shipping Board Emergency Fleet Corp.*, 7 F. 2d 676, 47-1 (E. D. N. Y.); *Quinn v. Southgate Nelson Corp.*, 121 F. 2d 190, 191 (C. A. 2), certiorari denied, 314 U. S. 682.

ment agent and over which the general agent is expressly denied all authority and control. While a seaman may have the right to *bring* a statutory Jones Act suit against the general agent (just as he can bring suit under the general maritime law), he can only hold the agent liable for the fault or negligence of its own independent employees, and can assert no cause of action against the agent for the fault or negligence of the master and crew, or of anyone who is not the agent's own independent employee, nor doing work assigned to the agent.

3. Finally, petitioner urges that the Clarification Act did not destroy the Government seamen's right to a Jones Act recovery against the general agent (Br. 22-48). But petitioner first disregards the fact, already pointed out, that unless the steamship company is operating the *vessel* as well as operating its shoreside *business*—of which alone the Government has given its general agents charge—the Government seaman never had a right of recovery against the company for the negligence of the master or crew, so that no such right could have been taken from him. On the other hand, as we have also pointed out, a right to recover on claims derived from the action or fault of the general agent's independent employees, engaged in doing its work entrusted to it by the United States, existed prior to the Clarification Act and was not disturbed by that legis-

lation. Petitioner's claim admittedly falls into the former category.

In any event, we submit—for the reasons set forth in Point V of the Brief for the Petitioner in No. 351—that the Clarification Act requires that after its enactment all causes of action arising out of the Government seaman's relation to the master and fellow crew members, by whom the United States mans, navigates, and physically operates its vessel, must be vindicated exclusively by suit against the United States pursuant to the Suits in Admiralty Act.<sup>5</sup>

For these reasons, petitioner's exaggerated reliance on assumed concessions by the Government in the lower courts wholly misreads our argument (Br. 23-26). We have always urged that, both before and after the Clarification Act, the general agent is not liable to seamen or to other third parties for the negligence or fault of the master or crew, but that a seaman can bring a statutory Jones Act suit against the agent for the fault or negligence of its own, independent employees. But in view of the *Hust* decision we also

<sup>5</sup> Petitioner's contention that various lower court decisions (Br. 45-48) established a numerical weight of authority that the Clarification Act does not make the Government seaman's remedy by suit against his employer, the United States, exclusive is fully answered by reference to the contrary decision of the Court of Appeals for the Third Circuit sitting *en banc* (*Gaynor v. Aquilines*, 169 F. 2d 612 (pending on writ of certiorari, No. 430)), of the Court of Appeals for the Ninth Circuit in *Lubinski v. Alaska S. S. Co.*, 153 F. 2d 1013, and of the court below.

urge that, if we be thought wrong on the scope of the general agent's liability prior to the Clarification Act; that statute prospectively prescribes an exclusive remedy against the United States under the Suits in Admiralty Act.

#### CONCLUSION

For the reasons set forth in the Brief for the Petitioner in No. 351, and summarized above, it is respectfully submitted that the judgment of the court below should be affirmed.

PHILIP B. PERLMAN,  
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JANUARY 1949.



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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1948**

**No. 430**

**ISAAC GAYNOR,**

*Petitioner*

*vs.*

**AGWILINES, INC.**

**BRIEF ON BEHALF OF PETITIONER ON WRIT OF  
CERTIORARI**

**I. The Opinions of the Courts Below**

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 23A) was rendered under date of November 26, 1947, and is reported in 76 F. Supp. 617.

The opinion of the United States Court of Appeals for the Third Circuit was rendered on August 4, 1948, and is reported in 169 F. (2d) 612.

**II. Jurisdiction**

1. The date of the judgment entered herein by the United States Court of Appeals for the Third Circuit, affirming the decree of the District Court, is August 4, 1948.

While the authority and responsibilities of an owner "pro hac vice" may differ from those of an operating agent in some respects, nevertheless, for most practical purposes, and particularly with respect to liabilities to seamen, they are essentially the same. In the *Hust* case, the majority held the General Agent liable as an operator. The concurring opinion pointed out that the General Agent had such a substantial measure of control over the management and possession of the vessel as to render the agent an owner "pro hac vice". While the liability of the General Agent here is the same whether he be an operator or an owner "pro hac vice", nevertheless, the additional evidence in this record clearly sustains the view that the status of the agent is tantamount to that of an owner "pro hac vice".

It is appropriate here to consider the record in determining who has possession of the vessel, and also who exercises the management over the vessel.

## SECOND POINT

**Under the General Agency Agreement the vessel is physically delivered to the General Agent who retains custody during the entire period of the Agreement.**

The Government has argued most vehemently that possession of the vessel was never vested in the General Agent, but on the contrary, it always remained with the Government. This contention is flatly contradicted at the very outset by the express provisions of the General Agency Agreement itself, in addition to other documentary and conclusive evidence.

Article I of the Agreement provides:

"Article 1. The United States appoints the General Agent as its agent and not as an independent contractor,



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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF AP-  
PEALS FOR THE THIRD CIRCUIT**

**BRIEF ON BEHALF OF PETITIONER**

**ABRAHAM E. FREEDMAN,**

*909 Jefferson Building,*

*1015 Chestnut Street,*

*Philadelphia 7, Pennsylvania,*

*Counsel for Petitioner.*

to manage and conduct the business of vessels *assigned to it* by the United States from time to time."

The use of the term "assigned" implies a transfer of the vessels for the enumerated purposes, i.e., to "manage and conduct the business of the vessels". This interpretation is supported by the next article of the Agreement, which requires the General Agent to "*accept*" the vessels which are "assigned" to it, as follows:

"The General Agent *accepts* the appointment and undertakes and promises so to manage and conduct the business . . . of such vessels as have been or may be by the United States assigned to and *accepted by* the General Agent."

The plain purport of these clauses means a delivery of the vessels by the United States and an acceptance of possession by the General Agent. This construction is most clearly substantiated by the provisions in the Agreement relating to termination. Article 11(a) provides:

"Article 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent *and to assume control* forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice."

This is a significant provision. If, as the Government contends and the Court of Appeals below found, the possession and control of the vessels was always in the United States, why should it be necessary to provide for the Government "to assume control" of something already in its control? The necessary inference is that the "control" passed to the General Agent and remained with the latter until the Agreement was terminated. In this connection, it is to be noted that the General Agent cannot terminate

the Agreement as to any vessel until her arrival and discharge at a continental United States port (Art. 11(b)). The inference from this provision is that the Agent was not to be permitted to divest itself of the operating responsibilities while the vessel was at sea or in a foreign port. The next provision in the Agreement expressly refutes any suggestion that the possession does not pass to the General Agent, as follows:

“Article 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, *all vessels and other property of whatsoever kind, then in the custody of the General Agent pursuant to this Agreement, shall be immediately turned over to the United States*, at times and places to be fixed by the United States . . . .”

Here is express recognition that the vessel was intended to be in the “custody” or possession of the General Agent. There is no need for speculation to determine what the parties had in mind. The language used leaves no room for different inferences. The Agreement, considered as a whole, clearly shows that the vessel was to be “assigned” with “control” and “custody” to the General Agent. The conclusion is inescapable that the Agreement contemplated a transfer of possession to the General Agent for the life of the contract.

Notwithstanding the plain language of the Agreement, the Government and the vessel operators, after the decision in the *Hust* case, re-opened the question in the *Caldarola* case, and there, upon a meager and inadequate record, urged a construction upon the Court which was grounded upon considerations debors the record. It was there contended that the General Agent under the Agreement had no more control or possession of the vessel than a “plumber” had

over premises where he was engaged to make a repair. The respondent and the Government urged that there was only one issue in the case and posed it in the following terms: "This case depends on control i. e. physical possession of the vessel." Significantly enough, the respondent and the Government carefully avoided the issues raised by the majority opinion in the *Hust* case, but singled out the concurring opinion of Mr. Justice Douglas for an extraordinary attack. Because the argument which was advanced in that case is the basis for the decision of the Court of Appeals in the instant case, it is highly important to carefully analyze it.

Respondent concentrated its most vigorous attack upon the point that the General Agent did not receive possession of the vessel, and in this connection, undertook to point out how Justice Douglas had "erred" in so construing the Agreement as to imply a "delivery" of the vessel to the General Agent. Respondent's brief (p. 25) states:

"Mr. Justice Douglas, evidently, took the phrase 'assigned to and accepted by the General Agent' as meaning 'delivered to and accepted by the General Agent.'"

The Government then takes an unequivocal position and stands on the point that since the parties had not used the word "delivered", they could not have contemplated that physical possession should pass to the agent, as follows:

"But, the parties to the contract did not use the word 'delivered'. *If they had contemplated that physical control would pass to the General Agent, 'deliver' would have been the natural word for them to use.* Their use of the word 'assigned' negatives the existence of an intent that physical possession of the vessels should be delivered." (Emphasis supplied.)



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The rationale of the respondent's argument is that the parties could not have meant the vessels to be delivered only because they did not use the magic word. We submit that the Agreement cannot be so construed, for, as we have stated, the reasonable interpretation to be applied to the word "assigned" is that the vessel was to be transferred, and it contemplated even more than a mere delivery. This interpretation is clearly supported by the other provisions of the Agreement which placed the "control" and "custody" in the General Agent. Aside of these facts, however, there is in this record conclusive documentary evidence (which was lacking in the *Caldarola* case) showing that the vessel was actually and physically "delivered" to the General Agent as required by the Agreement. The evidence is in the form of a "Delivery Certificate" rendered at the inception of the Agreement and a "Redelivery Certificate" rendered at the termination of the Agreement. Because these documents use the very word "delivered", which the Government previously maintained was not used, and thereby take the very foundation from under the Government's argument, it is appropriate to set these certificates out in full (R. 21):

"Delivery Certificate  
War Shipping Administration

December 31, 1942.

This Is to Certify That the S/S Christopher Gadsden owned by the United States of America, represented By the War Shipping Administration, was on the 31st day of December, 1942, at 7:00 P. M., E. W. T., delivered at the port of Wilmington, North Carolina by War Shipping Administration to Aguilines, Inc. Under Terms and Conditions of 'Service Agreement, Form GAA' said agreement having been executed March 5,

1942 having on board fuel, stores and equipment as per inventories taken on date of delivery.

WAR SHIPPING ADMINISTRATION

By (Sgd.) A. E. ROENTGEN

*Supply Officer*

Approved:

(Sgd.) G. F. BLAIR

*District Manager*

*War Shipping Administration*

*Port of Norfolk, Virginia*

AGWILINES, INC.

By SOUTHEASTERN SHIPPING SERVICE

By (Sgd.) ROGER STURGES RILEY"

When the Agreement was terminated, the General Agent re-delivered the vessel and received a receipt as follows (App. 22(a)):

"Redelivery Certificate

Receipt for Redelivery of the S. S. 'Christopher Gadsden'

(Official No. 242665)

The War Shipping Administration hereby accepts from Agwilines, Inc. redelivery of the S. S. 'Christopher Gadsden' as at 12:00 Midnight, Central Standard Time, June 18, 1946, at Galveston, Texas under Service Agreement, Form GAA (Contract, WSA-186, dated March 8, 1942) having on board fuel, water, stores and equipment as per inventories taken on the date of redelivery.

WAR SHIPPING ADMINISTRATION

By (Signed) W. G. YUNG

*Operations Supervisor*

AGWILINES, INC.

By (Signed) M. O. FANO

*Assistant to Vice President"*

These certificates completely destroy the very fabric of the respondent's theory and place a new aspect upon the

entire controversy. It is now clear that the liability may be imposed not only upon the basis of the majority opinion in the *Hust* case, but also upon the basis of the concurring opinion of Mr. Justice Douglas in that case, since there is now not the slightest question about the fact that possession of the vessel actually passed to the General Agent. It is this element of possession which makes the Agent an owner "*pro hac vice*", and accordingly liable in connection with all the seamen's rights.

Further analysis confirms also that the General Agent exercised a most substantial measure of control over the vessel's management.

**Under the terms of the General Agency Agreement the General Agent managed and conducted the business of the vessel as in private operation.**

The opposition contends that the General Agent plays no part in the management of the vessel and insists that the Agent is a "shoreside" Agent, whose duties are limited to accounting and fiscal affairs of the vessel. This view simply ignores the realities of the situation and is utterly irreconcilable with the Agreement itself, the Operations Regulations, and all other evidence in the case. It is to be assumed that if the Agent was to be a "shoreside" Agent, it would have been so designated as were "Berth Agents", for example. The very fact that the term "General Agent" was used implies in itself an overall authority which is completely borne out by the Agreement. The Agreement specifically imposes upon this General Agent the complete responsibilities for the operations of the vessel, even to the point of picking other agents in those distant ports where the General Agent has no facilities of his own. It is the General Agent who "hires and fires" the shipmaster and who instructs him with respect to his various duties, as dis-



closed by the Operations Regulations. In every respect, the General Agent exercises the same management over the vessel as an operator in private enterprise, subject only to nominal supervision of the Government. In this connection, it is clear from the authorities heretofore cited that the responsibilities of an operator of the vessel are not diminished in the slightest because the general owner of the vessel has reserved to himself any powers over the vessel's operations, so long as the operator exercises a substantial measure of control over the vessel's management. The fact that the General Agent does exercise such control is immediately evident from the Agreement itself, as well as from all other evidence in the case.

At the very outset, the Agreement, in unambiguous terms, places the management of the vessels in the hands of the General Agent. Article 1 sets forth the general character of the Agent's duties:

“ . . . to *manage* and conduct the business of the vessels assigned to it by the United States.”

Article 2 provides for the acceptance and management by the Agent *for* the United States, as follows:

“The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business *for* the United States.”

These provisions clearly demonstrate that it is the General Agent who is to manage the vessels, and that the Government not only relinquished possession, but also the direct control over the management. The argument that the management of the vessels remained with the Government is not only unsupported in fact, but it is simply made absurd by the Agreement.

Article 3A (a) illustrates how deeply the General Agent is concerned with the vessel's management and requires the General Agent to:

“(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyage, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices; . . .”

This provision independently destroys the respondent's theory, for it requires the General Agent to operate the vessels in all trades and send them into any corner of the world that the Government may direct. In this respect, the Government is in the position of a shipper who “time charters” the vessel and directs the owner or operator where to deliver the cargo. Just as the operator maintains the vessels in the trades designated by the shipper, so the General Agent does with the vessels assigned to him. While the vessels are being maintained in the various trades, it is part of the Agent's functions, in the management of the vessels, to keep them properly equipped, serviced and otherwise maintained, as provided for in (c) of the same Article 3A, as follows:

“The General Agent shall . . . equip, victual, supply and maintain the vessels.”

This provision, like the others, demonstrates the substantial exercise of management by the General Agent over all phases of the vessel's business, during all the while the vessel is in operation, and whether the vessel is on the high seas or in a home or distant port. Only a vessel operator is charged with duties such as these.

The only provision which has been singled out by the Government or the respondent is Article 3A (d) which re-

2. This is a proceeding arising under the general maritime law of the United States, and is within the jurisdiction of this Honorable Court.

3. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, United States Code, Title 28, Section 347(a) and under Article 3, Section 2 of the Constitution of the United States.

### III. Statement of the Case

This is an action by a merchant seaman, injured in the service of his vessel, to recover the costs of maintenance and cure, wages and loss of personal effects. The facts are not in dispute and have been stipulated as follows:

Petitioner signed on the Steamship "Christopher Gadsden" on September 10, 1945 as a utility man for a foreign voyage from Philadelphia, Pennsylvania, to any port or place in the world and return, for a period not exceeding twelve months. The vessel was owned by the United States and operated by the respondent, Agwilines, Inc., under an agreement of general agency.

On December 24, 1945, plaintiff, in the course of the voyage and while the vessel was in the port of Charleston, South Carolina, obtained shore leave to visit some relatives in a nearby town, and while enroute, the bus in which he was riding became involved in an accident which resulted in the plaintiff's injuries.

Claim was made for the cost of his maintenance and cure, wages and his personal effects which were never returned to him. Respondent denied liability for maintenance and cure and wages, but admitted liability for the loss of personal effects.

lates to the manning of the vessel. It is contended that this clause changed the prior practice with respect to employment of the crew, and that, since the master was to be considered an employee of the United States, ergo, the vessel was operated by the United States. Aside of the fact that this reasoning does not contemplate the status and relationship of the General Agent to the vessel, as outlined in the Agreement, it fails to withstand analysis. The particular clause in controversy provides:

"(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master."

A careful examination of this provision will clearly show that it does not in the slightest degree affect the rights or liabilities of the General Agent.

Note first of all that the employment of the master is under the control of the General Agent. The fact that he is to be considered an employee of the United States is of no consequence so far as the powers and liabilities of the Agent are concerned. In *The "Del Norte"*, 111 Fed. 542, although the master was appointed by the owner of the vessel, it was held that the charterer was responsible for



## THE ACTION OF THE DISTRICT COURT

The District Judge did not reach the merits of the case, but dismissed the complaint upon the ground that the Clarification Act (Act of March 24, 1943, C. 26, 57 Stat. 45-50 U. S. C. A. App. 1291 *et seq.*) nullified all right of action against the private operator and restricted the seamen's rights to a single remedy against the United States.

## THE ACTION OF THE COURT OF APPEALS

The Court of Appeals reached a contrary conclusion with respect to the application of the Clarification Act, and in this connection, held that the Clarification Act did not bar any suit against the General Agent. However, the Court of Appeals sustained the judgment of the court below upon the entirely different ground that the general agent was not an operator of the vessel, and, therefore, not responsible for maintenance and cure and wages, or for the loss of personal effects. In so holding, the Court held the case of *Hust v. Moore-McCormack*, 328 U. S. 707 to be overruled insofar as it had any application with respect to the claim for loss of personal effects which sounded in tort. Insofar as the other two claims were concerned, the Court held that the decision of *Hust v. Moore-McCormack* was not controlling.

## QUESTIONS INVOLVED

The basic issue raised by the decision of the Court of Appeals may be stated as follows:

- (a) Where the vessel is owned by the United States and is operated by a private company under an agreement of general agency, does the private operator become liable to an injured seaman for maintenance and cure, wages and loss of personal effects?

the torts of the master because, "having a legal right to control, he is legally presumed to actually control, the master's conduct". As a matter of law, therefore, the Court held that the master is subject to control of the operator, regardless of whether he is employed by the owner or operator. This was also found to be the fact in actual practice under the General Agency Agreements in *Barge Carriers, Inc. v. Atlantic and Gulf District of the Seafarers International Union*, Case No. 10-c-1382 (National Labor Relations Board), where it was found as a fact, *inter alia*, that the General Agent "hired and fired" the master in its discretion.

Further evidence that the master acts as Agent for the General Agent in actual fact is significantly manifested in *Read v. Agwilines* (Civil Action No. 5603, E. D. Pa.), (the same respondent here involved), where the *master* accepted delivery of the vessel from the Government, *as agent for the General Agent*. He signed the delivery certificate as follows:

"Agwilines, Inc.,  
By Frank Solis,  
Master, S/S Langdon Cheves."

In actual fact, therefore, it is the General Agent who hires and fires the master and who controls his conduct during the period of his tenure on the vessel, and in point of fact, the Master represents the General Agent in his official capacity. As a matter of law, it is likewise clear that the Master is subject to the control of the General Agent and that the latter is legally responsible for the actions of the Master. The provision of the Agreement under discussion clearly affords no support for the contentions of the respondent or the Government.

The provision that the Master shall exercise full control and responsibility over the navigation and management of

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The issue posed by the decision in the District Court is:

(b) Does the Clarification Act wipe out all of the seamen's traditional rights and remedies and preclude any suit against a private shipping company which operates the vessel under an agreement of general agency with the United States?

#### IV. Spetification of Errors

The Court of Appeals erred in the following respects:

First: In holding that the General Agents, operating the vessels under an agreement of general agency, are not engaged in the management of the vessels' business.

Second: In holding that the duties of the General Agents are limited to shoreside activities while the vessels are in port.

Third: In failing to hold that the General Agents received possession of the vessels and managed and conducted the vessels' business.

Fourth: In failing to follow the express ruling laid down in the *Hust* case, which held the General Agent liable to the seamen for all rights arising out of personal injuries, including damages, maintenance and cure, wages and loss of personal effects.

Fifth: In erroneously construing the decision in the *Caldarola* case and attributing to it a purport and scope not justified by the ruling or the reasoning upon which it was based; and particularly, in holding that it overruled, at least in part, the *Hust* decision.

Sixth: In destroying the uniformity and characteristic features of the maritime law by destroying some rights and making others variable, depending upon which ship the seamen happened to sign on, and by making the liability vary with different defendants.

the vessel affects no change in the prior practice, since the Master, under the law, is required to do precisely that. Because the Merchant Marine is so affected with a public interest, in order to insure the safety of life and property, the law requires every merchant vessel to be manned by licensed and certificated personnel and to be commanded by a licensed Master (46 U.S.C.A. 221 *et seq.*). The navigation and internal management of the vessel is and always has been the exclusive province of the shipmaster, and the law would prohibit any person from interfering with the Master's authority on board the vessel, even though such person be the owner or operator himself. That is not to say that the Master is not subject to the control of the operator, for the latter may remove or replace the Master at any time in its own discretion. The Agreement, therefore, added nothing to the Master's traditional authority.

The next provision in the Article under consideration provides that the General Agent shall procure the crew for engagement by the Master, and it is upon this clause that the Government and the Respondent have leaned most heavily. It is urged on the basis of this clause that the General Agent does not "man" the vessel, and consequently cannot be considered to be an operator. This argument also falls by the wayside upon examination.

The practice of employing seamen has been controlled by statute (46 U. S. C. A. 713) since 1872, which Act also prescribes the form of agreement which must be entered into, and requires that it be executed by the Master on the one hand and the crew on the other. The operator of the vessel is designated at the head of the Shipping Articles, along with other statistical data, but this is outside of the Agreement, and *the operator is not a party to the Agreement itself*. Accordingly, in order to "man" its vessel, an operator "procured" the seamen from the Unions and



## V. ARGUMENT

### Summary of Argument

It is petitioner's contention that under the General Agency Agreement the vessels are physically delivered to the General Agents and remain in their custody during the entire period of the contract; that under the terms of the contract, the General Agents are required to manage and conduct the business of the vessels in a fashion similar in every material respect to the activities of vessel operators in private enterprise, subject only to nominal supervision of the United States. In private operation, the vessel operator engaged a shipmaster and placed the vessel under his control, as required by law; the operator then procured the crew for engagement by the master (not by the operator). The crew were then employed by the shipmaster in the presence of a United States Shipping Commissioner, in accordance with the terms of an agreement prescribed by United States statute. This contract of employment (Shipping Articles) was entered into solely between the shipmaster and the crew. The operator was not a party to the agreement, but was only designated as "operator" of the vessel at the head of the Shipping Articles, outside the framework of the agreement. When the shipmaster assumed command of the vessel, he exercised complete and exclusive control over the vessel in accordance with the license issued to him by the United States Government, until he was relieved of his command. The direct internal management and navigation of the vessel was the exclusive legal responsibility of the shipmaster. He executed his duties in accordance with instructions from the operator, except insofar as the vessel's operations were governed by Federal Regulations.

transported them to the office of the United States Shipping Commissioner, where they were engaged by the Master and signed on before the Commissioner as required by law. The operator's function in "manning" a vessel, thus, simply means that he must "procure" the men for engagement by the Master. The General Agency Agreement requires the Agent to "man" the vessel in precisely the same manner, and, in effect, insures the continuation of the same practice. It is inescapably clear that the General Agent was required to "man" the vessels under the Agreement just as vessel operators have always done in private enterprise. These facts clearly destroy the Government's attempt to distinguish this agreement on the basis of the "manning" clause.

Further examination of the Agreement emphasizes the complete dependence of the United States upon the General Agent for the operation of the vessels. The Government looked to the General Agent to "protect and safeguard the interests of the United States," (Art. 3B(a)); to "keep its books relating to the management, operation, conduct of the business," (Art. 4(a)); *to cooperate with the United States when the latter desired to inspect the vessels*, (Art. 14). The fact that the United States required the cooperation of the General Agent simply to make an inspection demonstrates how completely the Government was, in fact, divorced from possession and control of the vessel.

The compensation paid to the General Agent under the Agreement also throws some light on the character and substance of the General Agent's duties. Article 5 of the Agreement provides for "fair and reasonable" compensation to be determined by the Administrator, but does not outline any basis or formula. The Regulations, however, do provide several methods of payment. In some instances the General Agent receives a designated sum for each day

Such was the manner in which vessels in private enterprise were operated before the War. *This practice was not changed one iota in any material respect under the General Agency Agreements.* Far from changing the prior practice, the General Agency Agreement simply codified the practice under which private vessels had been operated since the earliest days of the American Merchant Marine. The identical method of "manning" the vessel was employed under the agreement as existed before; the internal and external management and navigation of the vessels was exactly the same under the agreement as prevailed before. The functions of the General Agents under the agreement are, for all practical purposes, precisely the same as those of private operators prior to the agreement.

Under these circumstances, a vessel operator has always been held liable to the seamen for damages, maintenance and cure, wages and loss of personal effects, arising out of the "service of the vessel". In the *Hust* case, the Supreme Court held that the General Agent had the exact same liability to the seamen as an operator.

The Court of Appeals below, laboring under an erroneous interpretation of the *Caldarola* decision, held the *Hust* decision to be overruled insofar as the General Agent's liability for all obligations other than damages to seamen (based only on negligence) were concerned. It is petitioner's contention that the *Caldarola* decision furnishes no basis for any such interpretation, but, on the contrary, left the *Hust* decision expressly undisturbed. It is petitioner's contention that the right to damages, whether based on negligence or unseaworthiness, and all of the other seamen rights which arise out of the "service of the ship", including maintenance and cure, wages and loss of personal effects, are all inseparably bound together and may not be

from the time the vessel is delivered to the General Agent until the date it is redelivered to the United States. Other methods of calculating payment are governed by the nature and amount of cargo transported and the amount of business done by the vessel. This type of compensation obviously contemplates daily operation of the vessel at sea, as well as in port.

Strong evidence that the parties themselves considered and contemplated that the General Agent would be liable as an operator is manifested in Articles 8 and 16 of the Agreement. Article 8 recognizes that the General Agent would be liable in connection with all the seamen's rights and also to third parties in connection with any damage to persons, vessels, or other property. Provision was accordingly made to indemnify the General Agent against all losses arising out of those liabilities. Article 16(a) would seem to be repetitious in again indemnifying the General Agent against all claims "of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels." There was apparently no doubt in the minds of the General Agents when the Agreement was being drafted that they would be held liable as operators, and they made doubly certain that they would be amply protected from loss.

In this connection, it is pertinent to note that the General Agents clearly held themselves out as the employers of the seamen to the insurance companies who were underwriting the risks. In *Wright v. Eastern S. S. Lines, Inc.* (D. C. S. D. N. Y.—Adm. No. 152), the insurance company wrote the following letter to the General Agent:

"This is to advise you, as Insured under Primary Commercial Blanket Bond No. S-50,223, issued by this Company in your favor and dated the 31st day of De-



divided or diluted by superimposing a new label upon an old status.

With respect to the effect of the Clarification Act, it is petitioner's contention that Congress never intended to interfere with the rights and remedies between the seamen and the General Agents, but the Act was passed to eliminate the confusion which had arisen as to the rights and remedies between the seamen and the United States. Prior to the passage of the Act, there was a question as to whether the seamen, since, technically, they might become employees of the United States, would be entitled to the benefits of the Federal Employees Compensation Act and other statutes applicable to Federal employees, or whether they were to be governed by the same rules applicable generally to seamen in private industry. The Act clarified this situation by taking the seamen out of the class of Federal employees and giving them the same status as other seamen. The Act does not attempt to define or affect any of the seamen's rights against the General Agents or any other entities other than the United States.

Petitioner makes the following contentions:

(1) Under the General Agency Agreement, the General Agents are vested with possession and management of the vessels, and are subject to the same liabilities attaching to any other vessel operator in private enterprise.

(2) All of the seamen's rights arise out of employment on the vessel and may not be destroyed or diluted by artificial distinctions.

(3) The Clarification Act is limited in its application only between the seamen and the United States and does not affect any rights between the seamen and the private operators.

8  
FIRST POINT

**The General Agent receives physical possession and custody of the vessel and manages it as an operator during the life of the General Agency Agreement.**

In the District Court below, it was recognized that the General Agent was liable as an operator under the decision in the *Hust* case, but the action was dismissed solely upon the ground that all rights against the General Agent were wiped out by the Clarification Act. When the case reached the Court of Appeals, the Government appeared as *amicus curiae* and injected into the controversy an entirely different issue. It abandoned the argument which the District Judge had used in dismissing the complaint and supplanted it by a direct frontal attack upon the decision in the *Hust* case. It was argued that the decision in the *Hust* case was rendered by a majority of four Justices and that those four Justices now constitute a minority; ergo, their decision should be overruled. We fail to see the propriety or relevancy of such an argument, but the Court below was apparently impressed by the argument and accepted it, along with the argument which the Government made in the *Hust* case, that the General Agent was not an operator of the vessel.

While the argument advanced by the Government in the instant case was generally the same as it was in the *Hust* case, the Government, or to be more specific, the Maritime Commission, has changed its approach and now depends not upon the General Agency Agreement for support, but upon a self-serving letter from counsel for the Maritime Commission. This letter was first introduced in the *Caldarola* case, and although there have been many cases before and since that decision where there was opportunity for the Maritime Commission to prove the allegations contained therein, it is

significant that the Maritime Commission has not once attempted to do so.

In the instant case, the Government has advanced many "facts" in addition to the aforementioned letter, without a single offer of proof, all of which would seem to have been accepted by the Court below. Your petitioner denies those facts with the utmost vigor and in all sincerity, but he is utterly helpless to combat them, since he has never had the opportunity to challenge them by cross-examination, and offer proof in rebuttal. We accordingly submit that the issue here should be determined from an examination of the agreement and other evidence in this and the records of other cases, and those matters of which this Court may take judicial notice.

The real and basic issue before this Court is whether the General Agent was actually the operator of the vessel on which the petitioner served as a member of the crew at the time of his injury. If the answer be in the affirmative, then it is immaterial that the General Agent was operating the vessel for or on behalf of a third party, for the liability here is urged against the actual operator and no one else.

In the determination of whether the General Agent is a vessel operator with all of the attaching liabilities, it is generally necessary to show a substantial measure of control over the vessel's operations. Where there is a substantial measure of control over the management coupled with possession of the vessel, the vessel owner may be held liable as an owner "pro hac vice", even though the general owner reserves to himself, by contract, a certain measure of control or management. *United States v. Shea*, 157 U. S. 178; *Hill v. Leeds*, 149 Fed. 878; *Leary v. United States*, 14 Wall. 607; *Reed v. United States*, 11 Wall. 591; *Clyde S.S. Co. v. United States Shipping Co.*, 152 Fed. 516; *The Del Norte*, 111 Fed. 542; *Richardson v. Windsor*, 20 Fed. Cas. 11,795; *Webb v. Pierce*, 29 Fed. Cas. 17,320.

cember, 1945, that the words 'Employee' or 'Employees' as defined in the said bond shall be deemed to include the Captains and Crews of ships owned by the United States of America and operated by you under a Service Agreement with the War Shipping Administration."

In summary, the examination of the General Agency Agreement leads only to the conclusion that the General Agent was intended to be an operator with possession and control of the vessel.

**The Operations Regulations proved the General Agent to be the real operator of the vessel.**

Further evidence of the General Agent's heavy hand in the operation and management of the vessel is furnished by various Operations Regulations issued to General Agents by the War Shipping Administration. These regulations likewise completely negate the suggestion that the Agent merely managed the "accounting and other shoreside activities" of Government-owned vessels, or that the General Agent's activities "stop at the water's edge," contentions variously made by both the Government and the General Agent in litigations presently pending. (See Government's Brief Amicus Curiae in *Aird v. Weyerhaeuser Steamship Company* and in the instant case, both decided the same day by the Court of Appeals for the Third Circuit.)

Operations Regulation No. 111 provides that "all W. S. A. owned vessels may carry the stack markings of the General Agent to whom assigned." Surely such a privilege would not be accorded to a shoreside agent. It was notice to all the world that the vessel was being operated by the General Agents.

Operations Regulation No. 4 provides: "*General Agents shall assign to each new vessel . . . a master, chief*"



mate, chief engineer and first assistant engineer, approximately thirty (30) days prior to the completion and delivery date. All other officers and department heads, including radio operators and chief stewards, as authorized by War Shipping Administration shall be assigned approximately ten (10) days prior to such date . . . . The unlicensed personnel, except as otherwise provided for herein, shall be placed on the vessel effective as of the date of delivery to the general agent." This Regulation clearly confirms not only delivery and surrender of possession of the vessel to the General Agent, but that the Agent also manned the vessel.

Regulation No. 9, Supplement No. 1 provides: "General Agents are authorized and directed to employ as a member of the crew, one junior third mate . . . . The term of employment shall be in accordance with the General Agent's applicable collective bargaining agreement . . . ."

Regulation No. 42 involves safety precautions aboard merchant vessels and provides: "General Agents . . . are therefore directed to instruct the master and chief engineer aboard each vessel to ascertain prior to proceeding to sea, the condition of the floor plates in the engine room and fire room of their vessel . . . to take the necessary steps to have them firmly bolted."

Regulation No. 43 involves fuel oil conservation and provides: "General Agents are directed to instruct masters that wherever practicable, water shall be utilized for ballast purposes in lieu of fuel oil."

Regulation No. 50 involving crew advances in foreign ports provides: "General Agents are . . . directed to caution masters and crews of vessels calling at ports in foreign countries to discontinue payment in dollar currency

and to refrain from transactions in United States money . . . . *General Agents are authorized to empower the masters to convert local currency to United States dollars . . . .*

Regulation No. 51, Supplement 2, relates to pollution of navigable waters of the United States and provides: "All agents of the War Shipping Administration are hereby directed to give a copy of this Regulation to the master of each vessel . . . . *Masters shall be instructed to post this matter on the ship's bulletin board or otherwise bring it to the attention of all ship's personnel.*"

Regulation No. 52 provides: "General Agents are therefore directed to instruct masters of all vessels . . . . to keep shaft alley doors closed at all times, except when it becomes necessary to fill bearing reservoirs to make repairs . . . . General Agents are further directed to instruct masters that a notice to this effect must be posted adjacent to the shaft alley door . . . ."

Directive No. 1 dated October 8, 1942 addressed to all General Agents provides: "You are instructed to place a copy of this communication together with a copy of this letter in the hands of all *masters and officers in your employ*. You are also instructed to place a copy of this communication on the bulletin board in the crew's quarters or in a position where it may be seen by all crew members." (Note the explicit recognition on the part of the Government that both the master and the officers are employees of the General Agent).

Directive No. 2 dated October 8, 1942 provides: "*All operators have been instructed by the War Shipping Administration that failure to support the master and his officers in the lawful execution of his duties will not be tolerated.*" (Note the express recognition of the General Agent as operator of the War Shipping Administration vessels).

Regulation No. 56 requires the General Agent to *instruct masters* to familiarize themselves with protective measures relating to anti-gas preparations for merchant vessels.

Significant also is Regulation No. 63 concerning the employment of staff officers and provides: "General Agents of all vessels . . . are directed to employ instead, a junior assistant purser at a basic monthly salary of \$120.00

. . . The Maritime Training Service has been training combination junior assistant purser pharmacist's mates. General Agents are *authorized* to employ these graduates of the Service if desired on ships not carrying a doctor.

Regulation No. 12 provides: "In accordance with Article 14 of Service Agreement, Form GAA, the *General Agents are required* to arrange for the maintenance of vessels for the account of the United States."

Regulation No. 3 relating to maintenance and repair provides: "In connection with repairs on vessels *operated by your company* for account of War Shipping Administration, we are enclosing herewith for your information and guidance one copy of maintenance and repair regulations . . ." (Note express recognition that vessels are operated by the General Agents).

Regulation No. 3 further provides: "The attention of General Agents is directed to the provision of the service agreement (Form GAA) under which procuring of repairs to the extent authorized *is the responsibility of the general agent* . . . General Agents may award work to or enter into contract with any interested or related company only pursuant to Article 13 of the General Agency Agreement."

Thus, running all through the Regulations is the consistent recognition that the General Agent is the "operator" of the vessel and the "employer" of the crew. It is clear also that the Government recognized the General

Agent as the proper party to "instruct the Master" and other personnel on the vessel.

Although the United States, as owner, retained a certain measure of control necessitated by wartime exigencies, it was left to the General Agent to operate the vessel for all practical purposes, and in this situation the reserved powers of the Government cannot serve to lessen the liabilities of the operating agent with respect to any persons not a party to the General Agency Agreement.

### **The Caldarola Case**

In order to fully comprehend the Caldarola case, it is essential to inquire into the basis upon which the New York Court of Appeals in that case disposed of the question of liability. Caldarola's injuries resulted from the breaking of a cargo boom, part of the ship's gear, which, the jury held was defective. Liability was predicated upon the theory that defendant, the General Agent, owed him a duty to keep the ship in repair, and that such duty arose from the terms of the General Agency Agreement. The case was argued on common-law principles applicable to the landlord-tenant relationship, and was decided on the basis of *Cullings v. Goetz*, 256 N. Y. 287, the leading New York case on the subject.

*Cullings v. Goetz* involved an oral lease of certain premises, including a public garage, by the defendant-lessor to the lessee, who was a co-defendant in the case. Plaintiff, a third party who was on the premises as an invitee at the time, was injured by reason of the defective condition of one of the garage doors, and brought suit against both lessor and lessee, basing liability as to the lessor upon the theory that the lessor had agreed to make necessary repairs, and that his failure to do so after notice of the defective condition, constituted negligence for which the lessor was responsible to the plaintiff. The Court of Appeals



by Cardozo, J., rejected plaintiff's contention, as applied to the facts of the case, upon the ground that a mere promise by a lessor to repair cannot charge him with liability in tort to third persons for failure to keep his promise, *where under the lease exclusive possession and control over the premises is rested in the lessee*. The following excerpts from the opinion clearly disclose the theory underlying the Cullings decision:

(256 N. Y. at pp. 290-291): "The subject had divided judicial opinion. Generally, however, in this country as in England, a covenant to repair does not impose upon the lessor a liability in tort at the suit of the lessee or of others lawfully on the land in the right of the lessee (citing cases). There are decisions to the contrary (cases cited) but they speak the voice of a minority. Liability in tort is an incident to occupation or control (American Law Inst., Restatement of the Law of Torts, Sec. 227). By preponderant opinion, *occupation and control are not reserved through an agreement that the landlord will repair* (citing authorities). The tenant and no one else may keep visitors away till the danger is abated, or adapt the warning to the need . . . . *In saying this we assume the possibility of so phrasing and enlarging the rights of the lessor that, occupation and control will be shared with the lessee*. There are decisions in Massachusetts that draw a distinction between a covenant merely to repair and one to maintain in safe condition with supervision adequate to the end to be achieved (citing cases). In the case now at hand, the promise, if there was any, was to act *at the request of the lessee*. What resulted was not a reservation by an owner of one of the privileges of ownership. It was the assumption of a burden for the benefit of the occupant with consequences the same as if there had been a promise to repair by a plumber or a carpenter." (Emphasis supplied).

In brief, all that *Cullings v. Goetz* held was that the mere promise to repair premises does not reserve occupation and control, and does not impose a duty upon the lessor toward third persons, where the lessee has *exclusive possession and control* over the premises and the lessor does not expressly reserve any privileges of ownership. *The opinion recognizes that the engagement between the parties may be so framed that occupation and control will be shared by the lessor with the lessee, in which event liability to third persons is clearly indicated.* Seizing upon this decision the New York Court of Appeals in *Caldarola* (1945 A.M.C. 1319), in an opinion not notable for its clarity, came to the conclusion that New York law requires exclusive possession and control for the imposition of tort liability. That the New York Court saw fit to indulge in such unwarranted extension of the *Cullings v. Goetz* doctrine is, perhaps, beside the point. What is of the utmost significance, however, is that with the case reaching the Supreme Court of the United States in this posture (and that Court having determined in limine that in an action brought in the New York Courts the kind of possession and control which New York requires as a basis of tort liability to third persons is the exclusive concern of the New York Courts), the Supreme Court restricted its consideration of this phase of the case to an inquiry directed solely to the question whether the General Agent was an owner *pro hac vice*. In so doing, it is evident that the Supreme Court did not even impliedly approve the New York Court's patent and unwarranted extension of the *Cullings v. Goetz* doctrine. It simply considered itself foreclosed from entering into any such inquiry.

That *Cullings v. Goetz* does not justify the result reached by the New York Court of Appeals in *Caldarola*, and assuredly does not justify any such result in the case at bar, is evident from a consideration of the elements of posses-

sion and control heretofore discussed. The General Agent here does not stand on the same footing as an owner who has completely surrendered possession and control of the premises. Contrary to being an owner out of possession and control, the General Agent had taken possession of the vessel from the owner, had undertaken to operate and maintain the vessel, and had assumed management and control. He had a direct and substantial hand in the management of the business of the vessel, as contrasted to the lessor in the *Cullings* case who had nothing whatever to do with the business being conducted on the demised premises. The General Agent undertook in fact to equip, victual, supply and man the vessel. It undertook to maintain the vessel in trade. In operating the vessel, it tended to all of the details of operation, following regular commercial practices wherever the necessities of wartime operations did not require intervention by the United States. In all phases of activity it was in direct contact with the master, the officers, and members of the crew. It gave directions and instructions to the master and personnel of the vessel. It was the employer of the master and crew and was clothed with the incidents flowing from that relationship. The master himself, irrespective of his relationship to the United States, was, in fact, an agent of the General Agent, and acted for it and in its behalf. To contend that the General Agent, in this situation, is comparable to the lessor in *Cullings v. Goetz, supra*, is to ignore reality. Such result could have been reached only by a Court whose members are wholly unfamiliar with the maritime law and who have not been conditioned in the law of the sea.

In point of fact, the majority opinion of the Supreme Court in *Caldarola* did not in any sense undertake to decide what the liability of the General Agent would have been

under admiralty principles. Mr. Justice Rutledge's dissent, on the other hand, did, in the following terms:

(U. S. p. 165, L. Ed. p. 1975) "Regarding the case, as I do, as being controlled in its substantive aspect altogether by Federal law, I do not think that law requires or should permit the result the court reaches. Regardless of whether the so-called 'agency' contract makes the operating company an 'agent,' an 'owner *pro hac vice*,' or technically something else in relation to the United States, the federal maritime law in my opinion well might hold responsible to an injured longshoreman one who has knowledge that such persons will come aboard and who undertakes to keep the vessel and its equipment in safe condition for their use. (Citing Restatement, Torts, Sec. 383, and Restatement, Agency, Sec. 355.) More especially should such a rule apply when the person so undertaking is the only one constantly on board to observe the creation of hazardous risks in the vessel's daily routines, and, in addition, has such a degree of control over their creation as the 'agent' did here."

There is, therefore, persuasive authority for the proposition that had *Caldarola* proceeded through the Federal Courts, according to admiralty principles, his claim for damages would have been sustained. And this is so because common-law concepts of possession and control of shoreside premises simply do not fit into the scheme of the maritime law, any more than do the common-law concepts surrounding the master-servant relationship. (Cf. *Waterman Steamship Co. v. Jones*, 318 U. S. 724, 87 L. Ed. 1107; *Hust v. Moore-McCormack Lines, Inc.*, *supra*.) As Mr. Justice Rutledge pointed out in that phase of his dissent in *Caldarola* which the majority had no occasion to pass upon (i.e. liability under the maritime law) and which remains unchallenged by any authoritative expression of any of the Federal Courts:



(U. S. pp. 165, 166, L. Ed. pp. 1975, 1976): "Whether this (liability) is put upon the ground stated in the opinion of Mr. Justice Douglas, that the 'agent' became owner *pro hac vice*, or in view of the contract taken in the *Hust* case, with reference to application of the Jones Act, is largely immaterial, perhaps only a matter of words.

"That view, incorporating the rule of the *Hearst* case, we have only recently extended to apply in cases of coverage of the Social Security Act and the Fair Labor Standards Act. *United States v. Silk*, 331 U. S. . . .; *Harrison v. Greyvan Lines*, *id*; *Rutherford Food Corp v. McComb*, 331 U. S. . . . While the liability here is not legislative in origin, nevertheless as in the *Hust* case, application of the common-law 'control test' to defeat the longshoreman's remedy . . . cannot 'be justified in this temporary situation unless by inversion of that wisdom which teaches that "the letter killeth, but the spirit giveth life"' 328 U. S. at 725."

*Caldarola v. Eckert*, *supra*, does not, under any view of the matter, foreclose recovery in the case at bar, for here the General Agent was, in fact, in possession of the vessel and assumed that measure of management and control as, under admiralty principles, must necessarily lead to liability. And although a finding that the defendant here was owner "*pro hac vice*" is not essential, we respectfully suggest that upon the face of this record such a holding is strongly indicated. For while the Supreme Court in *Caldarola* felt that the consequences to the interests of the United States would be too far-reaching "to warrant such a forced reading" of the contract, merely to lay the basis for liability, the certificates of delivery and redelivery were not before that Court, and what may have appeared as a "forced" construction without them, becomes the only reasonable and logical conclusion in the face of the present record.

The General Agency Agreement here is in all material respects the same as the "agency" agreement, under which vessels were being operated for the United States before the war. It was attempted in connection with those agreements also to absolve the "Agents" of liability arising out of the operation of the vessels. In *Quinn v. Southgate Nelson Corp.*, 121 F. (2d) 190, cert. den. 314 U. S. 682, (the decision and reasoning of which was cited with approval and relied on in *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, where the Court reached the same conclusion on similar facts), the Court found that the Agent must bear the same liability as the United States in a carefully thought out and comprehensive opinion holding the Agent liable for injuries due to the negligent navigation of the vessel, as follows:

"The District Court was amply justified in finding negligence in the operation of the Waukegan. *The only question deserving discussion is whether the negligence is attributable to appellant, the managing agent of the vessel.* Appellant contends that the judgment against it was erroneous because the United States or the Maritime Commission is liable to appellee; it cites an opinion to the effect that the United States is liable, by the Attorney General, in 1925, construing a form of contract used by the United States Shipping Board, which appellant asserts to be similar to that involved here. But, assuming that there is such a similarity and that either the United States or the Maritime Commission is liable to appellee, *it does not follow that appellant is exculpated.* That a principal is liable for a wrong does not necessarily immunize his agent. *Blumenthal & Co. v. United States*, 2 Cir., 1929, 30 F. 2d 247, 248, 249; *Sloan Shipyards v. United States Fleet Corp.*, 1922, 258 U. S. 549, 567, 568, 42 S. Ct. 386, 66 L. Ed. 762. The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two

stringed bow. It is irrelevant here, whether at common law or by statute, appellee has a cause of action against the United States or the Commission for whatever amounts either of them may be obligated to pay appellee. Common sense and the precedents make appellant liable on the facts of this case. *It had a most substantial measure of control over the operation of the vessel; it was paid to 'manage, operate and conduct the business of the line.'* The reserved powers of the owner could not possibly have been so burdensome as to deprive appellant of de facto control, and there is no showing that in fact the owner did substitute itself as manager, either generally or at the time of this accident. Even if the Maritime Commission selected the officers, as appellant contends, appellant was not ousted of control. We think our opinion in *United States Shipping Board Emergency Fleet Corp. v. Greenwald*, 16 F. 2d 948, which held a managing agent with similar powers liable for the death of a seaman, is applicable here, although in that case the managing agent had an interest in the profits. That the compensation appellant received from the Maritime Commission was relatively small is of no importance, *for that was a matter of contract between it and the Commission, and cannot affect appellant's liability to third persons."*

The foregoing reasoning was adopted in the *Brady* and *Hust* cases and is equally applicable to the instant one. There is the same measure of control involved and this case is not complicated by any state rules of law as appeared to be the situation in *Caldarola*.

With respect to the nature and degree of control exercised by the General Agent, it is significant to note that although the Government has urged the acceptance of certain "facts", it has never once undertaken to offer any proof in support, despite the fact that there has been more than ample opportunity to have done so. On the other hand, in *Fink v. Shepard S.S. Co.*, *supra*, the parties did

not offer such proof as was then available, and the Court found from that evidence that the General Agent was the operator of the vessel, in fact, independently of the provisions of the agreement. There is, moreover, other evidence which was developed by the National Labor Relations Board, which is a complete and conclusive answer to the issues under consideration. In *Barge Carriers, Inc. v. Atlantic and Gulf Seafarers International Union* (N.L.R.B. Case No. 10-c-1382), the Board, after making its own investigation and conducting hearings, found from the evidence that the General Agent was the real operator of the vessel and the employer of the seamen. This finding of the Board squarely refutes the statements of "fact", as well as the contentions advanced by the Maritime Commission in this case. A consideration of the irreconcilable findings of these two branches of the Government makes it pertinent to point out that on the one hand the statements of the Maritime Commission are nothing more than unproved allegations of a not impartial agency (the Maritime Commission has intervened in effect as a party defendant in all of this type litigation and has had a measure of control over the litigations from the outset). On the other hand, the Board cannot be said to have had any "feelings" in the matter, but reached its conclusion from a study of the proven facts. Under these circumstances, the findings of the Board are entitled to great weight to the exclusion of the unproved declarations of the Commission counsel. A few brief excerpts from the Board's findings completely destroy the mantle of immunity which the Commission has attempted to build around the Agent, as follows:

"The respondent contends that the United States, and not itself, is the employer of the employees here concerned and that, in accordance with Section 2 (2) of the Act,<sup>2</sup> the Board lacks jurisdiction over it."



In developing the facts, the trial examiner found:

"After carrying general cargo between Port Everglades, Florida, and Havana, Cuba, on two voyages, the respondent informed the W.S.A. that it could not continue this service since it resulted in an operating loss. The W.S.A. then stated that it would 'take over' the vessels and that the respondent would operate them for the W.S.A. Early in October, the W.S.A. took possession of the vessels, which the respondent had operated, on a bare-boat charter basis. The United States, acting through the W.S.A., and the respondent entered into a service agreement. This agreement, termed in the record as the General Agency Agreement, defines the duties and responsibilities of the respondent with respect to vessels of which the W.S.A. is owner or, under bare-boat charter, owner *pro hac vice*, which may be assigned to the respondent as general agent of the W.S.A. . . ."

.. . . .

"Although the execution of the General Agency Agreement thus circumscribed the respondent's control over the operation of the vessels, *no substantial change occurred in the relationship* between the respondent and the employees here concerned in respect to their wages, hours of employment, and similar conditions of employment. *The respondent still hires the master, subject, however, to the approval of the W.S.A., and may discharge him . . .*"

.. . . .

"The respondent maintains the basic scale of wages which it had established prior to the execution of the General Agency Agreement. Subsequent to the execution of the General Agency Agreement, a representative of the W.S.A. requested information of the respondent as to the 'wage schedules, overtime rates and working conditions of the personnel on tugs and barges operated by' the respondent for the account of

the W.S.A. After submitting such information, the respondent was told to maintain its existing wage scale and other labor relations policies while operating for the account of the W.S.A. *The W.S.A. has not otherwise exercised any control over the hire and tenure of employment, wages, hours of duty, or other conditions of employment of the personnel aboard the vessels operated by the respondent. And it is plain from the testimony of members of the crew that they regard the respondent, and not the W.S.A., as their employer.*"

The trial examiner then summarizes the result of the findings, as follows:

"From the foregoing findings, considered in the light of the entire record, the undersigned is convinced that the respondent is the employer of the employees here concerned, within the meaning of the Act. *The acquisition by the W.S.A. of the vessels and the execution of the General Agency Agreement effected no change in the relationship between the respondent and the employees here concerned. Nor, despite the control exercised by the W.S.A. over the sailings and cargo of the vessels, has there been any change in, or attempt by the W.S.A. to change the working conditions of the employees. Realistically, it is plain that the labor policies concerning these seamen are controlled entirely by the respondent, under only nominal supervision of the W.S.A. The creation of the W.S.A. and the vesting in it of control over the shipping of the United States was a temporary measure designed to utilize more effectively such shipping for the prosecution of the war. The control exercised by the W.S.A. over the respondent's operations has been concerned largely with voyages and cargo, and not with labor relations. In excepting the United States as an employer from the application of the Act, the Congress can not have intended the exception to apply to a situation in which, for all practical purposes, the essential elements of*

*the employer-employee relationship remain in the control of the private operator, under only nominal and temporary supervision of the W.S.A. In the Cosmopolitan Shipping Company case, in which the contractual relationship between the United States and the company there involved was substantially the same as that between the United States and the respondent, the Board said:*

*It appears to us that the Government, in turning over the operation and management of its vessels to a private corporation under the existing Agreement, has avoided, rather than assumed, the responsibilities of an employer. It has established the American France Line as a commercial venture, operating in competition with other lines. In the conduct of the business of the line, the Company is in full charge, receiving compensation based on the results of its own efforts. The Company, under the nominal supervision of the Government, does the actual hiring of the employees and has the sole direction of their activities while engaged in their duties on board the vessels.*

• • • • •  
 "The undersigned finds that the respondent is an employer of the employees aboard the vessels operated by the respondent, within the meaning of the Act."

Comparison of these proven findings of fact with the reckless *ex parte* statements of the Commission requires an unqualified rejection of the latter. The conclusion is incapable that the General Agent has such a substantial measure of control over the vessel's operations as to make it liable both as an operating agent, as well as an owner "*pro hac vice*". This view supports the same conclusion reached from an analysis of the agreement itself and of the other data in the record, and is likewise sustained by the decision in the *Hust* case, which, far from being overruled, was expressly affirmed by the *Caldarola* decision.

The control and supervision which the United States exercised over the activities of the Merchant Marine during the war did not substantially impair the control of the General Agent. It is true that the Government exercised a measure of control, but it was restricted to a very narrow field and it was imposed only insofar as it was necessary and expedient to the successful prosecution of the war effort. The maritime industry did not stand alone in this respect. Landowners operated under rent control; industry operated under price rationing, wage and manpower controls; all for precisely the same reason. Such control as the Government exercised over these activities no more impaired the rights and liabilities of the operators of these enterprises than did the comparable Governmental control in the maritime field. The destination of the cargo, the route to be followed, the safety precautions to be taken, and other similar matters had to be subject to military control for security and military reasons. In all other respects, however, the General Agent operated the vessel with all the duties and liabilities incident to such operation. In brief, such Government supervision as was imposed, made necessary by wartime conditions, did not destroy the legal incidents flowing from the private operation and management of wartime industries, of which the Merchant Marine was an integral part.

**All of the seamen's rights are inseparably bound together by virtue of their relationship to the vessel and every such right may be asserted with equal force against the General Agent.**

The only reasonable deduction to be drawn from the foregoing considerations is that the General Agent is liable in connection with all of the seamen's rights and not just a part of them. The decision of the Court of Appeals makes



a distinction between claims specifically based upon the Jones Act and all others. The gist of the opinion is that only damage claims based on negligence may be prosecuted against the General Agent, to the exclusion of all other claims. This means that damage claims based upon unseaworthiness, as well as claims for maintenance and cure, wages and loss of personal effects, may not be advanced against the General Agent.

Such a view fails to contemplate the real remedy provided by the Jones Act, as well as the real basis of the liability for all these rights.

The Jones Act did not provide any separate rights as such, but rather incorporated all the statutes relating to railway employees into the maritime law, and the remedy, as the Court pointed out in *Panama R. R. v. Johnson*, 264 U. S. 375, is under the maritime law as modified by the Jones Act. See also *Brown v. Mallory*, 122 F. (2d) 98; *German v. Carnegie-Illinois Steel Corp.*, 156 F. (2d) 977. Among other things, the Railway Acts abolished the fellow servants doctrine and gave rise to a cause of action for negligence. The foregoing authorities make it clear that in any action for damages a cause of action exists if there be any unseaworthiness or negligence, and although the actions have loosely been characterized in some instances as "Jones Act cases", actually, they are governed by the maritime law with the Railway Acts incorporated. The effect of the decision below would split this cause of action into two parts so as to allow a recovery against the General Agent based on negligence of fellow servants, but not if based on unseaworthiness, and thus, conflict with the very purpose of the Jones Act.

The decision below would also absolve the General Agent of any liability for maintenance and cure and here again the Court overlooks the real basis for the liability. The

Court below recognized that there is a liability under the Jones Act against the General Agent. *A fortiori*, there must be a legal duty, the violation of which is redressable under the Jones Act. The law is clear that the failure to provide maintenance and cure is a tort giving rise to an action under the Jones Act. It must, therefore, follow that there is a duty on the part of the General Agent to provide maintenance and cure in the first instant. In *Cortes v. Baltimore Insular Lines*, 287 U. S. 367, the suit was for damages based on the failure to provide maintenance and cure. In holding that the duty to provide maintenance and cure arises out of the employment and that the violation of the duty constitutes a tort, Mr. Justice Cardozo said:

" . . . A remedy is his also if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure.' The duty to make such provision is imposed by the law itself as one annexed to the employment. The *Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, *supra*. Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident. *If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt.*"

"We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties."

"So, in the case at hand, the proper subject of inquiry is not the quality of the relation that gives birth to the duty, but the quality of the duty that is born of the relation."

• • • • •

"Here performance was begun when the vessel started on her voyage with Santiago aboard and with care and cure cut off from him unless furnished by officers or crew. *From that time forth withdrawal was impossible and abandonment a tort.*"

The foregoing case, thus, not only points up the liability of the General Agent for maintenance and cure and wages, as well as for damages, but it also illustrates the intimate relationship between the General Agent and the vessel's operations. For, even though the vessel may be on the high seas, it is the General Agent's duty as vessel operator to furnish medical care to an injured seaman, and this can only be done by the ship's officers or crew. The failure of the latter to render proper care renders the General Agent liable just as in the *Hust* case, the negligence of a member of the crew causing an injury to another rendered the General Agent liable there.

This case pointedly illustrates the inseparable quality of the seamen's rights and the urgent necessity to assert them against the General Agent, both upon principle, as well as from consideration of policy. The *Hust* decision is explainable on no other hypothesis except that the officers and members of the crew are, in the performance of the ship's work, rendering services for the General Agent. It is the traditional obligation of the Master and officers of a vessel to provide proper and adequate medical care to a seaman injured or falling ill in the service of the ship. *Cortes v. Baltimore Insular Line, supra*. The discharge of this obligation is as much a part of the ship's work as is the naviga-

tion of the vessel. If a seaman is injured through faulty navigation, his right to recover against the General Agent is clear under the *Hust* decision. Should he be injured through the failure to provide adequate medical attention or the negligent administration of medical aid, his rights against the General Agent must be equally clear, for here also the negligent act is performed in the ship's service, and *a fortiori*, in the course of employment. To hold otherwise is to indulge in metaphysical distinctions which would cut the heart out of the protection intended by the Jones Act. *Cf. Waterman Steamship Corp. v. Jones*, 318 U. S. 724. In brief, any attempt to isolate the seaman's remedies into so-called "Jones Act rights" as against maritime rights must not only lead to consequences which are incongruous, but which must inevitably result in a destruction or dilution of the seamen's rights and remedies. The distinction which the Court below makes between "Jones Act" and other cases serves only to emphasize the basic fallacy in the Court's finding.

### **The Clarification Act**

Under the law prior to the passage of this Act, the seaman had the right to bring suit against the Government under the Suits in Admiralty Act (46 U.S.C.A. 741, *et seq.*) for any cause of action arising on a merchant or a public vessel owned by the United States. *American Stevedores v. Porello*, 330 U.S. 446; *Canadian Aviator Ltd. v. United States*, 324 U.S. 205; *United States v. Marine*, 151 F. (2d) 742. Because the seamen on Government-owned ships were considered to be technically employees of the United States, it was felt that the rights and remedies of these men might be confused with the rights applicable to Federal employees generally, such as the Federal Employees Compensation Act and the Civil Service Retirement Act. There was thus the likelihood that the seamen, as Federal em-



ployees, might be limited to the rights of Federal employees to the exclusion of their rights as seamen under the maritime law. The Clarification Act was expressly designed to clarify this situation and preserve the rights under the maritime law to the exclusion of any other laws. The section of the Act which preserves the rights under the maritime law is as follows:

“Officers and members of crews (hereinafter referred to as ‘seamen’) employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, (chapter 7 of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.”

The following provision then takes the seamen out of the category of regular Federal employees:

“Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended (chapter 15 of Title 5); the Civil Service Retirement Act, as amended (chapter 14 of Title 5); the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress) (sections 1001-1017 of this Appendix; Title 5, sections 691, 693, 715; Title 34, Section 943); or the Act entitled ‘An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United

States and certain other persons or reimbursement therefore', approved December 2, 1942 (Public Law 784, Seventy-seventh Congress) (Title 42, sections 1701-1717)."

"Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act (Title 46, Sections 741-752), notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act."

The Act thus eliminated from the picture the possible application of the rights of Government employees and insured to the seamen their rights as seamen to be administered under the Suits in Admiralty Act.

It has been suggested that this excerpt of the Act, because it prescribes the method of enforcement against the United States, it thereby prohibits ~~any~~ suit against the private operator. This is a construction which is wholly foreign to the letter and spirit of the Act. This entire section will be read in vain for any suggestion that Congress intended to affect the rights or liabilities of the private operator, or any entity other than the United States. Had Congress intended to wipe out the suits against the private operators, it unquestionably would have done so (if it was constitutionally possible\*) in the most clear, unambiguous and express language. It certainly would not have left such an important matter to implication. In this connec-

\* In *Panama Railroad v. Johnson*, 264 U. S. 375, the Supreme Court said that when the constitution was adopted it incorporated into it the maritime law as it then existed, and while the maritime law can now be changed, altered or amended, it can only be done within certain limits. Nor can anything be taken out of that law which is an inherent part of it, and nothing can be added which changes the characteristic features of the maritime law.

tion, it is extremely significant to note that in Section 4 of the Act (50 App. 1294), in allowing for limitation of liability, Congress specifically mentions the private operators and makes them eligible for the benefits of the limitation of liability statutes. If the statute wiped out the remedy against the private operator, why then was it necessary to provide limitation of liability? Moreover, since Congress recognized the identity of the private operators and made special provision for them under the limitation of liability Acts, why then did Congress not mention the private operators elsewhere in the statute if it intended to give them immunity along other lines? The answer undoubtedly is, that Congress never intended to disturb the relationship between the seamen and the private operators. A review of the authorities clearly sustains this view.

**The Clarification Act did not affect any rights between the seamen and private operators.**

In *Hust v. Moore-McCormack* (*supra*), while the cause of action arose before the effective date of the Clarification Act, and while the Supreme Court specifically stated that it was not passing on the prospective application of the Act, the Court, however, in order to cope with the problem before it, was required to make a most comprehensive analysis of the Act, and in arriving at its ultimate decision, the Court made certain significant observations which are highly pertinent in the controversy at bar. After reviewing the entire history of the Act, the Court said:

"A further word remains to be said about the legislative history of the Clarification Act in general. Both parties have relied strongly on excerpted portions thought to support their respective views. As is true with respect to all such materials, it is possible to extract particular segments from the immediate and total context and come out with road signs pointing in

opposite directions. We do not undertake to illustrate the contrast from the history in this case. It can be said, however, with assurance that, taken as a whole, the committee reports in Congress, together with appended documents from various affected agencies and officials, are amorphous in relation to the crucial problem presented in this case. All of them give evidence of concern that rights may have been lost or rendered uncertain by the transfer, and that action should be taken by Congress to preserve the substantive rights intact and remedial ones at the least by extension of the Suits in Admiralty Act to cover them.

*The entire history will be read in vain, however, for any clear expression of intent or purpose to take away rights, substantive or remedial, of which the seaman had not already been deprived, actually or possibly by virtue of the transfer. Whether or not this conserving intent was made effective in the prospectively operating provisions of the Act, it is made clear beyond question in the retroactive ones. Congress was confessedly in a state of uncertainty. But, being so, it nevertheless had no purpose to destroy rights already accrued and in force, whether substantive or remedial in character. Its object, in this respect at the least, was to preserve them and at the same time to provide an additional assured remedy in case what had been preserved might turn out for some reason to either be doubtful or lost.*" (Emphasis supplied)

It is clear from the foregoing language that Congress intended to insure to the seamen the rights under the maritime law in the event their relationship to the United States, and the possible application of the Compensation Act, *inter alia*, should prejudice those rights under the maritime law. It was nowhere contemplated that this Act should affect the relationship between the seamen and the private operators, much less curtail any rights of those seamen.

In *Cohen v. American Petroleum Corporation*, 1947



A. M. C. 336, the New York Court reached the same conclusion. In first setting forth the issue, the Court said:

"The Fort Laramie was being operated by the defendant for the War Shipping Administration under an agreement similar to that involved in *Hust v. Moore-McCormack Lines Inc.*, — U. S. —, 1946 A. M. C. 727, June 10, 1946. And the question to be decided, before going into the merits of the action, is whether the plaintiff may sue the operating company at law under the Jones Act or whether, as the defendant contends, plaintiff is limited to a suit against the United States under the Suits in Admiralty Act (46 U. S. C. sec. 741, ff.).

On the basis of the *Hust* decision, this question would of course be decided in favor of the plaintiff were it not for the defendant's contention that the Act of March 24, 1943, defining the rights of seamen employed through the War Shipping Administration ('Clarification Act,' Stat. 45; 50 U. S. C. Appendix, sec. 1291) compels seamen to sue under the Suits in Admiralty Act. The *Hust* case held that a seaman on a merchant vessel operated by a private shipping company under arrangement with the War Shipping Administration could sue the operator at law under the Jones Act. The Court thought that whether seamen on such vessels, are 'technically' employees of the United States or of the shipping company, it would require more than logical deduction from the premises that the United States is the owner of the vessel and the operator only the agent to conclude that the Jones Act denies seamen a recovery at law against the operator and limits them to a recovery under the Suits in Admiralty Act, but with the substantive benefits of the Jones Act. To repeat another court's paraphrase of the Supreme Court language, 'the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act' (*Militano v. United States*, 1946 A. M. C. 1145, at 1147; 156 F. (2d) 599, 602).

*Hust* had been injured on March 17, 1943; the statute now in question was passed a week later. Does the

act of March 24, 1943, change the situation? The question was deliberately and necessarily left open in the Hust decision, 1946 A. M. C. 741-2."

The Court then points out that the Act was intended to avoid confusion and duplication of benefits under different acts applicable to government employees:

"As the legislative history of the Clarification Act shows, there had been considerable doubt in the early part of the war period as to the rights and remedies of seamen on vessels operated by private steamship companies for the War Shipping Administration; there had been 'confusion and duplication of benefits.' Were these seamen employees of the government; did they have the rights of government employees as to compensation benefits for injuries, as to retirement provisions? Could they in addition recover under the Jones Act; and in what tribunal was an action to be brought? Were the private operators liable? (Senate Report No. 62, 78th Congress 1st session; H. Rep. No. 2572, 77th Congress, 2d session; H. Rep. No. 107, 78th Congress, 1st session.)"

The text of the Act itself is then referred to independently of the committee reports and the Court concludes that it clearly refers only to the liability of the government to the seamen and not to any liability of the private operators, as follows:

"The act was passed so as to define the rights of such seamen once and for all, but it is plain from a reading of the statute itself and without the aid of the committee reports that what was intended to be fixed was the liability of the government toward the seamen; the rights and obligations of seamen vis-a-vis the government were alone in the question. The statute provided that because of the temporary wartime character of their employment by the War Shipping Administration, seamen employed

• • • as employees of the United States through the War Shipping Administration' were 'not to be considered as officers or employees of the United States for the purposes of the U. S. Employees Compensation Act, • • • the Civil Service Retirement Act,' &c. They were, however, to 'have all of the rights • • • under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels,' that is to say, among other rights, those under the Jones Act. And those rights could only be enforced in admiralty under the Suits in Admiralty Act. *Is it not clear that Congress was speaking only of seamen who, it thought, were employees of the United States and only of the obligations which the United States as employer owed them?* It may be that Congress, taking a narrow view of the decision in *Brady v. Roosevelt Steamship Company*, 317 U. S. 575, 1943, A.M.C. 1, believed that there was no liability upon the part of the operating companies and that only the government was liable; and it was providing the basis of government liability and the court which would enforce it. It may be that Congress did not foresee that the Supreme Court in the *Hust* case would permit a recovery against the operating companies without reference to the question whether seamen could also sue the government. These doubts of Congress and its uncertainty as to the posture of affairs were reflected in Mr. Justice Rutledge's references to the act in the *Hust* case. 'We need not determine in this case whether prospectively the Clarification Act affected the rights of the seamen against the operating agent and others, or simply made sure that his rights were enforceable against the Government' 1946 A.M.C. 741-2. *Yet the fact is that the liability of the operators is in no way touched in the statute. Their obligations to the members of the crew therefore remain as they were without reference to it* . . .

Very pertinent to the case at bar also is *Moss v. Alaska Packers Association*, 1945 A.M.C. 493, where, as here, the

plaintiff, while ashore on leave was injured, and brought suit for wages and maintenance and cure. The same objections were raised there as were raised in the instant case. Significantly enough, that case was decided before the *Hust* case but arrived at the same conclusion by the same process of reasoning. After holding the general agent liable as an operator, following the doctrine laid down in the case of *Brady v. Roosevelt Steamship Company*, 317 U. S. 575, the Court then meets and rejects the argument that the Clarification Act wiped out the liability of the private operator and affirms the decision below as follows:

"Appellant raises the point that Public Law 17 (Act of March 24, 1944, 76th Congress) makes only the United States suable. It is my opinion that this law does not exempt the private ship owner from suit. Public Law 17 provides that seamen shall have the same rights they always had. They are not to be classified as employees under federal compensation laws. The law also reads that claims for maintenance, cure, wages and damages shall be presented to the private ship owner and not to the United States of America. Thus, the law examined in its entirety leads me to conclude that the private ship owner and not the United States of America is to be considered as the employer."

In a like manner, the Court in *Gay v. Pope and Talbot, Inc.*, 1944 A.M.C. 855, also decided before the *Hust* decision, points out after a careful review of the legislative history and background holds the general agent liable as an operator and, with respect to the effect and purpose of the Clarification Act, held:

"Public Law 17 was first offered in the House of Representatives as H. R. 7424 in 1942 and its purpose was declared in Senate Report No. 1813, 77th Congress, 2nd Session, to be: 'Inasmuch as seamen covered by Section 1 will be entitled to the rights provided under



the Jones Act and general maritime law and to the remedies under the Suits in Admiralty Act, they are expressly excluded from any benefits which would otherwise accrue as employees of the United States under the United States Employees' Compensation Act. This eliminates the danger that seamen might recover both against the Federal employees' compensation fund and under statutory or common-law remedies for the same injury.' "

It is thus clear that the Clarification Act was intended to fix the rights and liabilities only as between the seamen and the United States, and it was not intended to disturb the seamen's rights against anyone else.

### Conclusion

The record before this Court compels the conclusion that the General Agent is the real operator in possession of the vessel, and that it exercised such a substantial degree of management and control over the vessel as to render it liable for all incidents flowing from the vessel's operations; and these responsibilities were not lessened in any degree by the nominal supervision of the United States arising out of considerations of security. This case is clearly controlled by the principles of the maritime law as outlined in the decision of this Court in the *Hust* case. The decision of the Court below is in clear conflict with the pronouncements of this Court, and should therefore be reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,  
*Counsel for Petitioner.*

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No. 160-Misc.

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**FILED**

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CHARLES ELMORE CAMPBELL

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1948

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ISAAC GAYNOR, PETITIONER

v.

AGWILINES, INC.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE THIRD  
CIRCUIT

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MEMORANDUM FOR THE RESPONDENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 162 Misc.

ISAAC GAYNOR, PETITIONER

v.

AGWILINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE THIRD  
CIRCUIT

## MEMORANDUM FOR THE RESPONDENT

The decision of the court below involves the question of whether a civil service employee of the United States, injured while serving as a seaman on a government-owned and operated vessel, may recover for his injuries in a suit brought against a ship's husband or general agent which acted for its disclosed principal, the United States, only in respect of certain shoreside business of the vessel, and had no authority or control over the work of the employee or the operation of the vessel and neither caused the injuries nor owed any duty whatever to prevent them.

There are now pending before this Court two other petitions for writs of certiorari, No. 351, *Cosmopolitan Shipping Company v. Robert A. McAllister*, for a writ to the United States Court of Appeals for the Second Circuit, and No. 360, *Fred W. Fink v. Shepard Steamship Company*, for a writ to the Supreme Court of the State of Oregon, both of which likewise involve the right of the Government's seamen to recover against its shoreside business agents in cases where the agent and its employees are without fault. In Nos. 351 and 360, the government seamen involved are suing for damages caused by the negligence of fellow civil service seamen in the navigation and management of the vessel. In the instant case, as the petition for a writ of certiorari indicates, the government seaman seeks to recover the maintenance, cure and wages which the United States as his employer is obligated to furnish him.<sup>1</sup> In addition, this Court has already granted a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, No. 179, *Lillian A. Weade, et al. v. Dickman, Wright & Pugh, Inc.*, to review the related question of the right of passengers, carried on a government-owned and operated vessel under the terms of the War Shipping Administration standard form passenger ticket contract with the United States, to recover from the Government's shoreside.

<sup>1</sup> The cause of action for loss of personal effects is being settled and paid by the Maritime Commission and thereby will be eliminated from the case.



business agent for the negligence of the Civil service master and crew with which the United States manned, navigated and managed its vessel.

In all four of these cases, because of the public importance of the question and the fact that the United States is the real party in interest, we have taken over the defense in this Court. While we regard the decision of the instant case by the court below as correct in every respect, it unquestionably is in conflict with the *McAllister* case, No. 351, *supra*. We further believe that this case presents an appropriate complement to Nos. 351, 360 and 179 which will afford the Court an occasion to resolve at this Term, substantially all of the currently disputed issues as to any right of the Government's seamen, and other third parties, to recover from its shoreside business agents instead of from itself as their disclosed principal.

We accordingly do not oppose the granting of the writ in this case confined to the question of the agent's liability for maintenance, cure and wages, and respectfully request that, if the writs shall issue, all four cases be set down for argument with Nos. 351, 360 and the instant case to be heard together and followed in turn by No. 179.

Respectfully submitted.

PHILIP B. PERLMAN,  
*Solicitor General.*

NOVEMBER 1948

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1948**

**ISAAC GAYNOR, PETITIONER**

**AGWILERS, INC.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT**

**BRIEF FOR THE RESPONDENT**

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 430

ISAAC GAYNOR, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
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BRIEF FOR THE RESPONDENT

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## OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Pennsylvania (R. 23-30) are reported at 76 F. Supp. 617. The opinion of the United States Court of Appeals for the Third Circuit, sitting *en banc* (R. 41-53), is reported at 169 F. 2d 612.

## JURISDICTION

The judgment of the Court of Appeals was entered August 4, 1948 (R. 53). The petition for a

writ of certiorari was filed October 16, 1948, and was granted November 22, 1948 (R. 54).<sup>1</sup> The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

#### QUESTIONS PRESENTED:

1. Whether respondent was actually an operating agent in possession and control of the vessel upon which petitioner, a civil service employee of the United States, was serving as a crew member at the time of his injury, and was as such liable to petitioner for his wages, maintenance and cure.

2. Whether in a case arising after the enactment of the War Shipping Administration (Clari-

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<sup>1</sup> On the same day, this Court also granted certiorari in No. 351, *Cosmopolitan Shipping Company v. McAllister* and No. 360, *Fink v. Shepard S. S. Co.*, and set the three cases down for hearing immediately following No. 179, *Wedde v. Dichmann, Wright & Pugh*, in which certiorari had already been granted, and which, like these three cases, also involves the question of the liability of general agents of the former War Shipping Administration. The Solicitor General appears for respondent general agent in this case and for the general agents in the other cases because, in accordance with the wartime general agency agreement between respondent and the War Shipping Administration, the United States is obligated for any recovery effected to the extent not covered by insurance (W. S. A. Form GAA 4-4-42 (R. 5, 12)). On the standard form insurance which is obtained, the United States in effect assumes the reinsurance of the most substantial part of all losses. House Merchant Marine and Fisheries Committee, Doc. No. 4, *Compilation of Standard Contract Forms of the War Shipping Administration*, p. 847. The defense of such actions is assumed by the Department of Justice whenever it appears to be required by the public importance of the question involved.

<sup>2</sup> These questions are here stated in terms of petitioner's contentions; they are phrased more generally and more extensively in the Brief for the Petitioner (pp. 2-4) in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351.



fication) Act of March 24, 1943, the remedy of a government-employed seaman for wages, and maintenance and cure is exclusively against the United States.

#### STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, i. e., the War Shipping Administration (Clarification) Act (57 Stat. 45, 50 U. S. C. App. 1291) and R. S. 1753 (5 U. S. C. 631), together with certain applicable Civil Service Rules and War Shipping Administration Operations Regulations, are set forth in Appendix A to the Petitioner's Brief in *Cosmopolitan Shipping Company, Inc. v. McAllister*, No. 351, and will not be reprinted here.

#### STATEMENT

Petitioner Isaac Gaynor signed shipping articles on September 10, 1945, as a member of the crew of the War Shipping Administration SS *Christopher Gadsden*. The articles, which were in the statutory form of an agreement with the master as representative of the shipowner, contained the endorsement:

It is also agreed that the Master, Officers, and all other Members of the Crew are employees of the United States subject to the provisions of Public Law No. 17 of the 78th Congress, as amended, and are not employees of Agwilines, Inc. \* \* \*

and expressly identified respondent Agwilines as general agent for the War Shipping Administra-

tion (Ex. A, R. 38-39).<sup>3</sup> By reason of this employment, petitioner was an unclassified civil-service employee of the United States under Section xxi (1) of Schedule A to the Civil Service Rules (Appendix A, No. 351, p. 138). Respondent Agwilines was a general agent or ship's husband employed by the United States to operate the accounting and certain other parts of the shoreside business of the *Gadsden* and other WSA vessels, in accordance with the wartime standard form GAA 4-4-42 husbanding agreement, to the extent and in the manner which the Government by "directions, orders or regulations" might from time to time prescribe (R. 5-19).<sup>4</sup>

The articles called for a foreign voyage, from Philadelphia, Pennsylvania, to undisclosed ports and return, for a period not exceeding twelve months, (R. 3). While the *Gadsden* was at Charleston, South Carolina, on December 24, 1945, petitioner obtained shore leave, left the vessel about 5:00 p. m. and purchased a bus ticket for a trip to visit relatives (R. 3). Petitioner boarded the bus the next day, but after it had proceeded about thirty miles from Charleston it became involved in a highway accident and petitioner was injured (R. 3-4).

<sup>3</sup> The stipulation of facts states that petitioner "entered into shipping articles with the defendant" (R. 3). But the official printed form of articles, Exhibit A, states that the agreement was "between the master and seamen, or mariners, of the SS *Christopher Gadsden*, of which John J. Kelly is at present master, or whoever shall go for master."

<sup>4</sup> WSA Form GAA 4-4-42, 7 F. R. 7562; 46 C. F. R., 1943 Cum. Supp., p. 11427, sec. 306.44.



Petitioner was disabled, required medical treatment, and as a result was unable to engage in his occupation (R. 4).

Petitioner brought this suit against respondent<sup>5</sup> seeking recovery of \$15,000 for wages, for maintenance and cure, and for loss of personal effects (R. 32-34).<sup>6</sup> The complaint alleged that respondent "possessed, owned, operated and controlled the Steamship *Christopher Gadsden*," that petitioner "entered into shipping articles with defendant [respondent] as a member of the crew of the Steamship *Christopher Gadsden*" and that "by virtue of his service upon the vessel," he was entitled to recover his wages; maintenance and cure from respondent (R. 32-33). Respondent's answer denied the allegations that it possessed, owned, operated or controlled the *Gadsden* and that petitioner entered into shipping articles with it; instead, it averred that the vessel "was serviced by it as Agent for the United States" pursuant to the terms of a general agency agreement in the standard form (7 F. R. 7562), and that petitioner "was on board the said vessel pursuant

<sup>5</sup> On February 24, 1947, petitioner also filed a libel against the United States in admiralty. *Isaac Gaynor v. United States of America and United States Maritime Commission*, U. S. District Court, Eastern District of Pennsylvania, Admiralty No. 77 of 1947. This admiralty suit has not yet been brought to trial.

<sup>6</sup> The cause of action for the value of petitioner's personal effects, which were lost after their removal from the vessel by respondent, has been settled and paid by direction of the United States Maritime Commission, and is thereby eliminated from the case.

to the terms of a written contract embodied in the Shipping Articles of said vessel, and not otherwise" (R. 34-35). The answer further alleged as affirmative defenses that the *Gadsden* was "owned, operated and controlled by the United States," that respondent "acted only as Agent" pursuant to the standard form agreement, and that petitioner had failed to comply with Public Law 17, 78th Congress (the Clarification Act), requiring all actions for claims of the nature asserted in the complaint to be brought pursuant to the Suits in Admiralty Act (R. 36-37).

The case was submitted to the district court on the pleadings, an agreed statement of facts (R. 3-4), the shipping articles (Ex. A, R. 38-39), and the GAA 4-4-42 agreement together with the delivery and redelivery certificates evidencing the vessel's allocation to respondent (R. 5-22). That court held petitioner, having complied with the Clarification Act by filing claim in accordance with the War Shipping Administration's regulations, was entitled to enforce his claim by court action, but "such action must be brought, since the plaintiff was an employee of the United States through the War Shipping Administration at the time the cause of action arose, in accordance with the terms of the Clarification Act, which provides that the action must be brought pursuant to the Suits in Admiralty Act" (R. 25). The action against respondent was therefore dismissed and the dismissal



confirmed on rehearing (R. 31). On appeal, the court below, sitting *en banc*, unanimously affirmed (R. 53). It held that the Clarification Act gave federally employed seamen substantive rights "to be measured by those of seamen employed by private ship owners rather than by those of other employees in the government service," but since such seamen "were in fact employees of the United States and not of private ship owners the rights which were thus given them must necessarily be enforced against their employer, the United States" (R. 45). It further held that, independently of the Clarification Act, petitioner had no enforceable right against respondent since he was fully aware that the United States was operating owner in possession and control of the *Gadsden* and his employer as such (R. 49).<sup>7</sup>

#### ARGUMENT

Petitioner, a civil-service seaman of a War Shipping Administration vessel, who was injured in a bus accident ashore, at a point over thirty miles from his vessel while on authorized shore leave to visit relatives, brought this suit to recover wages, and maintenance and cure, in the sum of \$15,000, against respondent, an agent of the United States

<sup>7</sup> Judge Biggs concurred specially (R. 53), on the ground stated in his separate opinion in *Aird v. Weyerhaeuser S. S. Co.*, 169 F. 2d 606 (now pending on petition for a writ of certiorari, No. 291 Misc., this Term), that this Court's decision in *Caldarola v. Eckert*, 332 U. S. 155, had overruled or limited the doctrine of *Hust v. Moore-McCormack Lines*, 328 U. S. 707.

employed under the wartime GAA 4-4-42 husbanding agreement. The issue thus presented is whether a civil-service employee of the United States, injured while serving as a crew member of a government-owned and operated vessel, may recover for his injuries in a suit brought against a ship's husband or general agent which acted for its disclosed principal, the United States, only in respect of certain shoreside business of the vessel, and had no authority or control over the work of such employee, or the navigation and physical management and operation of the vessel, and neither caused the injuries nor owed any duty to prevent them. Both lower courts held that he could not recover on a cause of action which, like his, arose after the War Shipping Administration (Clarification) Act of March 24, 1943 (c. 26, 57 Stat. 45, 50 U. S. C. App. 1291), and that his exclusive remedy was by suit against his employer, the United States (R. 25, 28, 45). The court below further held, in reliance upon its decision *en banc* of the same day, in *Aird v. Weyerhaeuser S. S. Co.*, 169 F. 2d 606 (now pending on petition for a writ of certiorari, No. 291 Misc., this Term), that as respondent was a simple agent for a disclosed principal, and not an operating agent or owner *pro hac vice* in possession and control of the Government's vessel, it could not be held liable for petitioner's wages, and maintenance and cure, in any event (R. 49).

The reasons and authorities establishing the



correctness of these lower court holdings in the present case are set forth in detail in our Brief for the Petitioner in the companion case of *Cosmopolitan Shipping Co., Inc. v. McAllister* (No. 351, this Term), and need no repetition. It will suffice to point out here the salient defects of the particular contentions with which this petitioner attacks the decision below.

1. The heart of petitioner's contention here is that the lower courts erred in failing to find that respondent was actually operating the vessel for or on behalf of the United States, as distinct from managing the vessel's "business" (Br. 9). But the owner of a vessel is deemed to continue as operating owner in possession<sup>8</sup> and therefore liable for the claims of her crew, and one who seeks to recover against another has the burden of proving that the latter has been made owner *pro hac vice* (i.e. operating owner to whom the vessel belongs for the voyage, see 46 U.S.C. 713).<sup>9</sup> It is in disregard of these established principles that petitioner demands that respondent, against whom he has chosen to bring his suit, assume the burden of

<sup>8</sup> *Hagar v. Clark*, 78 N. Y. 45, 50; *Raymond v. Tyson*, 17 How. 53, 63-64; *Pacific Imp. Co. v. Schubach-Hamilton S. S. Co.*, 214 Fed. 854 (W. D. Wash.); *Grimberg v. Columbia Packers' Assn.*, 47 Ore. 257, 270-271.

<sup>9</sup> *Everett v. United States*, 284 Fed. 203 (C. A. 9), certiorari denied, 261 U. S. 615; *The Del Norte*, 119 Fed. 118, 123 (C. A. 9); *The John E. Berwind*, 56 F. 2d 13 (C. A. 2); *Baccarat v. Andrew F. Mahoney Co.*, 1933 A. M. C. 1652, 1656 (N. D. Calif.); *Cox v. Lykes Bros.*, 237 N. Y. 376; *Roberts v. United States S. B. Emergency Fleet Corp.*, 240 N. Y. 474, 477.

proving its non-liability (Br. 8). On the contrary, it is plain as a matter of law, as we point out in No. 351, that respondent was not an operating agent in possession and control of the Government's vessel nor its owner *pro hac vice*.

Throughout his brief petitioner seeks to confuse the role of the ship's husband or "general agent," who "operates" the vessel's "business," with that of the "operating agent" who mans, navigates, and physically manages the vessel as owner *pro hac vice* pursuant to a demise of the ship from its general owner. And by language torn from context in the GAA 4-4-42 husbanding agreement (Br. 10-11, 17-18), the WSA "delivery certificate" evidencing the beginning and end of the vessel's assignment to an agent (Br. 14-15, 20), and certain of the Operations Regulations by which WSA issued instructions to its masters through its agents as its recognized channel of communication (Br. 24-27), petitioner insinuates that the absence of a demise to the agent from the United States of the physical possession and control of its vessels is without significance. But the insubstantiality of petitioner's suggestions is fully shown in our brief in the *McAllister* case (No. 351). We there demonstrate that under the decided cases the presence of a demise to the agent of the vessel is as critical for the creation of an "operating agency" as is a demise to the charterer for that of a bareboat charter (Pet. Br. in No. 351, Point IV, 102-114).



We point out that the language of the GAA 4-4-42 husbanding agreement, on which petitioner relies to show that the agent has physical possession and custody of the vessel, is found equally in the berth agency and berth sub-agency agreements (Pet. Br. in No. 351, pp. 76-86), that the "delivery certificates" refer only to a "delivery" for accounting purposes under the GAA 4-4-42 husbanding agreement,<sup>10</sup> and that the Operations Regulations confirm that control of even the minutiae of physical operation was retained by WSA (Pet. Br. in No. 351, pp. 86-95).

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<sup>10</sup> The fallacy of attributing undue weight to the use of words such as "delivered" and "redelivered" is discussed in detail in the petitioner's brief in No. 351, p. 57, fn. 24.

Petitioner's reliance on the signature of such a "delivery certificate," in another case, by the master (Br. 20), and on the statement of an insurance company to a general agent, in still another case, that masters of vessels under the GAA 4-4-42 husbanding agreement might be treated as its employees for purposes of the agent's commercial fidelity bond (Br. 23-24) are totally without significance. It is obvious that such acts cannot bind this respondent nor the Government. Moreover, it is elementary that if the fact be disclosed to the parties, an agent (i.e., the master) of a principal, such as the United States, may also act on behalf of another agent (i.e., the general agent) of the same principal. Cf. *Restatement of Agency*, secs. 391, 392. The Maritime Commission informs us that it has never felt required to object to its masters signing inventories and delivery receipts on behalf of a general agent where the agent is not represented in the port at which the "delivery" or "redelivery" takes place and no inventory service company is available (as was the case here, see R. 21). With respect to the matter of bonding masters of vessels under GAA 4-4-42 agreements, the WSA prescribed a standard form of bond by General Order 28, 46 C. F. R. 1943 Cum. Supp., p. 11449. If general agents desired additional commercial coverage for any reason, the expense would not be reimbursable to the agent and WSA could not, of course, object to its form or to the extension of the coverage to include employees of the government.

2. Petitioner appears to urge that this Court's holding in *Caldarola v. Eckert*, 332 U. S. 153, 159, that an agent under the GAA 4-4-42 husbanding agreement is not an owner *pro hac vice* or "operating agent", has no vitality except in the state courts, and that, in any event the Court's conclusions were erroneous. (Br. 28-35.) The broad grounds which show the correctness of the *Caldarola* decision are the subject of most of our brief in No. 351. And that this Court was applying federal law, in determining that the general agent was not in possession and control of the vessel nor its owner *pro hac vice*, is apparent on the face of the opinion (332 U. S. at 158-9).

3. Petitioner also attempts to find support for his view that general agents are operating agents by extended reference to the intermediate report of a trial examiner for the National Labor Relations Board in the so-called *Barge Carriers* case. (Br. 36-40). In answer, it seems sufficient to refer to the official correspondence between the War Shipping Administration and the National Labor Relations Board, described in petitioner's brief in No. 351 (pp. 72-74) and set forth in the record in *Fink v. Shepard Steamship Co.*, No. 360, this Term, at R. 43-57. That correspondence discloses that the Board did *not* adopt the view that the seamen were employees of the general agents, but effected an arrangement with WSA whereby the Board's facilities were to be available even though the seamen



were government-employed. Petitioner incorrectly implies that the Board receded from this position in the *Barge Carriers* case. The truth is that, whatever may have been the trial examiner's views, the Board itself never decided that WSA merchant seamen were not government employees, or that the general agents were their employers. In the *Barge Carriers* matter, the trial examiner's intermediate report was issued on March 17, 1944, and the case was then transferred to the Board itself on March 22, 1944. It was retained before the Board in an inactive status until February 13, 1947, when, on motion of the complaining union, the Board dismissed the complaint without prejudice, and without making any determination on the issue here involved. As for the examiner's intermediate findings, on which petitioner relies so heavily, we believe that, like petitioner's own contentions, they suffer from the double infirmity of being in conflict with the *Caldarola* decision and unsupported by the terms and practice of the GAA 4-4-12 agreement.<sup>11</sup>

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<sup>11</sup> For the convenience of the Court, we print the relevant portion of the trial examiner's intermediate report, as well as related documents, in the Appendix, *infra*, pp. 16-32.

One crucial defect in the trial examiner's report is his entire failure to differentiate between the GAA 4-4-12 husbanding agreement and the special operating agency agreement which was before the National Labor Relations Board in its *Cosmopolitan* case, to which he refers as a precedent. As we have pointed out in the Brief for the Petitioner in No. 351 (pp. 50-51, 58-61, 156-162), the latter agreement which was also involved in *Odgaard v. Cosmopolitan Shipping*

4. Petitioner finally urges that "the Clarification Act did not affect any rights between the seamen and private operators" (Br. 44-53). He argues that various decisions by trial judges sitting alone which conflict with that of the court below sitting *en banc*, of the Supreme Court of Oregon in the *Fink* case (No. 360, this Term), and of the Ninth Circuit in *Lubinski v. Alaska S. S. Co.*, 153 F. 2d 1013, constitute a numerical weight of decision to which this Court should bow. We submit that, on the contrary, we have proved in the Brief for the Petitioner in No. 351 (pp. 114-134) that the Clarification Act requires that, on causes of action arising after its enactment, all WSA seamen shall vindicate their rights exclusively by suit against the United States under the Suits in Admiralty Act.

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*Co.*, 171 Misc. 244; *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575; and *Quinn v. Southgate Nelson Corp.*, 121 F. 2d 190 (C. A. 2), certiorari denied, 314 U. S. 682, expressly provided that the agent should operate the vessel as owner *pro hac vice* and man it with a crew employed by itself and not by the United States. This is the direct contrary of what is provided by GAA 4-4-42, where the general agent is only a ship's husband whose authority stops at the water's edge.

## CONCLUSION.

For the reasons set forth in the Brief for the Petitioner in No. 351, *Cosmopolitan Shipping Co., Inc. v. McAllister*, and summarized above, it is respectfully submitted that the decision of the court below should be affirmed.

PHILIP B. PERLMAN,  
*Solicitor General.*

H. G. MORISON,  
*Assistant Attorney General.*

LEAVENWORTH COLBY,

PAUL A. SWEENEY,

*Attorneys.*

JANUARY 1949



## APPENDIX

## NATIONAL LABOR RELATIONS BOARD

WASHINGTON 25, D. C.

FEBRUARY 13, 1948.

Re: Barge Carriers, Inc.—Case No. 10-C-1382

Mr. H. G. MORISON,

*Acting Assistant Attorney General,**United States Department of Justice,**Washington 25, D. C.*

DEAR SIR:

In reply to your letter of February 12, I am sending you enclosed a certified copy of the Intermediate Report issued by the Trial Examiner in this case on March 22, 1944.

After this Report issued, exceptions to the Trial Examiner's Findings and Recommendations were filed by the respondent. Before the Board issued any decision in this matter, the charging union requested permission to withdraw the charge. On February 13, 1947, the Board entered an Order Permitting Withdrawal of Charge and Dismissing Complaint. A certified copy of the Order is also enclosed.

Very truly yours.

(Sgd.) FRANK M. KLEILER,

*Executive Secretary.*

Enclosures.



## UNITED STATES OF AMERICA

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 10-C-1382

IN THE MATTER OF BARGE CARRIERS, INC. *and* ATLANTIC AND GULF DISTRICT OF THE SEAFARERS INTERNATIONAL UNION OF N. A.

Order Permitting Withdrawal of Charge and  
Dismissing Complaint

The Board having, on March 22, 1944, issued an Order transferring the above-entitled proceeding to itself, and thereafter, on January 29, 1947, Seafarers International Union of North America having requested permission to withdraw its charge previously filed herein, and the Board having duly considered the matter,

It is hereby ordered, pursuant to Section 203.7 of National Labor Relations Board Rules and Regulations—Series 4, that the said Union be, and it hereby is, granted permission to withdraw its charge in the above-entitled proceeding; and

It is further ordered that the complaint be, and it hereby is, dismissed without prejudice, and that the aforesaid case be, and it hereby is, closed.

Dated Washington, D. C., February 13, 1947.

By direction of the Board:

(S.) JOHN E. LAWYER,  
Chief, Order Section.

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
TRIAL EXAMINING DIVISION  
WASHINGTON, D. C.  
Case No. 10-C-1382

IN THE MATTER OF BARGE CARRIERS, INC. *and* ATLANTIC AND GULF DISTRICT OF THE SEAFARERS INTERNATIONAL UNION OF N. A.

*Mr. Mortimer H. Freeman*, for the Board.

*Mr. W. J. Kelley*, of Fort Lauderdale, Fla., for the respondent.

*Mr. J. K. Shaughnessy*, of Fort Lauderdale, Fla., for the Union.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon an amended charge duly filed by Atlantic and Gulf District of Seafarers International Union of N. A., herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Tenth Region (Atlanta, Georgia), issued its complaint, dated October 14, 1943, against Barge Carriers, Inc., herein called the respondent, alleging that the respondent had engaged and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8(1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49

Stat. 449, herein called the Act.<sup>12</sup> Copies of the complaint, together with notice of hearing, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance: (1) that the respondent discharged Hans E. Hansen on or about May 9, 1943, and thereafter refused to reinstate him because of his membership in and activity on behalf of the Union and because he engaged in concerted activity with other employees, thereby discriminating in regard to his hire and tenure of employment and discouraging membership in the Union; and (2) that by the foregoing conduct, and since March 1, 1943, by urging, persuading, threatening and warning its employees to refrain

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<sup>12</sup> Evidence was adduced by the respondent for the purpose of showing that the Union and J. K. Shaughnessy, who signed the charge and amended charge as agent of the Union, had not complied with a Florida statute requiring, among other things, that labor organizations operating in Florida make an annual report to the Secretary of State and that business agents of labor organizations obtain a license or permit. Chapter 21968, No. 334, June 10, 1943. The respondent contends that, because of failure of compliance with this statute, neither the Union nor Shaughnessy "was authorized" to file a charge with the Board, and that the Board accordingly lacked jurisdiction to issue a complaint. It is unnecessary to determine whether the Union or Shaughnessy has complied with the statute, since lack of compliance, if any, would not disqualify them from filing a charge. The Act provides no limitations as to who may file a charge. In *N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9, the Supreme Court of the United States, speaking through Mr. Justice Jackson, stated:

"The charge is not proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading. Dubious character, evil or unlawful motives, or bad faith of the informer cannot deprive the Board of its jurisdiction to conduct the inquiry."



from assisting or joining the Union, by threatening to cut wages and curtail employment because of the union activity of the employees, and by vilifying the Union, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Thereafter, the respondent filed its answer, admitting certain allegations of the complaint concerning its business, and denying that it had engaged in unfair labor practices. In its answer, the respondent moved to dismiss the complaint on the ground, in substance, that the respondent is not the employer of the employees herein concerned, within the meaning of Section 2 (2) of the Act. During the hearing, mentioned below, the undersigned reserved his ruling upon this motion. For reasons which appear below, the motion is hereby denied.

Pursuant to notice, a hearing was held at Fort Lauderdale, Florida, on October 28, 29, 30 and 31, and November 5, 1943, and at Miami, Florida, on November 15, 1943, before Robert F. Koretz, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by a representative; all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties. Near the close of the hearing, counsel for the Board moved to conform the pleadings to the proof respecting formal matters. There was not objection; the motion was granted. At the conclusion of the hearing counsel for the Board and for the respond-



ent argued orally before the undersigned. Subsequent to the hearing, the respondent filed a brief with the undersigned.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF THE RESPONDENT

The respondent, Barge Carriers, Inc., is a New York corporation having its principal office in New York City. It is licensed to do business in Florida and maintains docks and places of business at Fort Lauderdale and Port Everglades, Florida. It is engaged in operating the tug *Humrick* and various barges for the account of the War Shipping Administration. In the conduct of its business the respondent transports substantial quantities of sugar and other commodities to and from ports in foreign countries from and to ports in the United States. The respondent admits that it is engaged in commerce, within the meaning of the Act.

The undersigned finds that the respondent is engaged in trade, traffic, commerce, and transportation among the several States and between the United States and foreign countries, and that the employees aboard the tug and barges operated by the respondent are directly engaged in such trade, traffic, commerce and transportation.

### II. THE ORGANIZATION INVOLVED

Atlantic and Gulf District of the Seafarers International Union of North America is a labor organization affiliated with the American Federa-

tion of Labor. It admits to membership employees of the respondent.

### III. THE RESPONDENT'S STATUS AS EMPLOYER

The respondent contends that the United States, and not itself, is the employer of the employees here concerned and that, in accordance with Section 2(2) of the Act,<sup>13</sup> the Board lacks jurisdiction over it.

The respondent was organized as a corporation in 1941. Until October 1942 it operated the tug *Humrick* and the barges *Lake Frumet* and *Lake Farge* as a single unit for the account of Daniel C. Robinson, Inc., the owner or charterer of the vessels.<sup>13a</sup> Prior to October 1942 the respondent was engaged in the carriage of freight, shipping coal from Norfolk to Havana, manganese ore from Santiago to Mobile, and sulphur from New Orleans to North Atlantic ports. Shortly before October 1942 the respondent was requested by the United States, presumably through the War Shipping Administration, herein called the W. S. A.<sup>13b</sup>

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<sup>13</sup> Section 2 (2) of the Act provides:

"The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof \* \* \*."

<sup>13a</sup> The *Humrick* was owned by the Ford Motor Company and chartered by Daniel C. Robinson, Inc.

<sup>13b</sup> In February 1942, the President of the United States, "in order to assure the most effective utilization of the shipping of the United States for the prosecution of the war," by Executive Order created the W. S. A. Executive Order No. 9054 of February 9, 1943. The Executive Order provides, *inter alia*, that the W. S. A. shall "control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States," with certain exceptions not here relevant.



to operate the vessels under its instructions. After carrying general cargo between Port Everglades, Florida, and Havana, Cuba, on two voyages, the respondent informed the W. S. A. that it could not continue this service since it resulted in an operating loss. The W. S. A. then stated that it would "take over" the vessels and that the respondent would operate them for the W. S. A. Early in October the W. S. A. took possession of the vessels, which the respondent had operated, on a bare-boat charter basis. The United States, acting through the W. S. A., and the respondent entered into a service agreement. This agreement, termed in the record as the General Agency Agreement, defines the duties and responsibilities of the respondent with respect to vessels of which the W. S. A. is owner or, under bare-boat charter, owner *pro hac vice*, which may be assigned to the respondent as general agent of the W. S. A. The terms of this agreement provide, *inter alia*, that the respondent, called the general agent therein, is an agent of the United States, and not an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time; that the general agent will maintain the vessels in such trade or service as the United States may direct, subject to the orders of the United States as to voyages, cargoes, and to all matters connected with the use of the vessels, and will equip, victual, supply, and maintain the vessels subject to such directions, orders, regulations, and methods of supervision as the United States may from time to time prescribe; that the general agent will procure the master of the

vessels operated under the agreement, subject to the approval of the United States, who thereby becomes the agent and employee of the United States; that the general agent, through the usual channels and in accordance with customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated, will procure and make available for the master for engagement by him such officers and men whom he may require to fill the complement of the vessel; that the officers and members of the crew shall be paid in the customary manner with funds provided by the United States; and that the United States shall reimburse the general agent for all crew expenditures, including disbursements for wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages, or compensation for death or personal injury or illness, and insurance premiums required to be paid by law, custom, or by the terms of the ship's articles or labor agreements.

The vessels which the respondent previously had operated were assigned to it by the W. S. A. Subsequently, in March 1943, another barge, the *Lake Louise*, which formerly was owned by the Ford Motor Company, was assigned by the W. S. A. to the respondent for its operation. In accordance with the terms of the service agreement, the respondent operates the tug and the three barges under the direction of the W. S. A. The W. S. A. directs the respondent as to where and when the vessels shall sail. Thus, the respondent's tug *Humrick* is one of a pool of about five tugs which the W. S. A.



maintains at Port Everglades. The W. S. A. gives instructions as to which barges the tugs shall tow. The *Humrick* frequently tows barges which are privately owned or which are operated for the W. S. A. by others. With respect to the cargo carried upon the barges operated by the respondent, the W. S. A. directs the respondent to enter into contracts, called charter parties, with shippers for the carriage of certain cargo.<sup>14</sup> The money which the respondent receives from shippers in pursuance of the charter parties is deposited in a bank selected by the W. S. A. in an account entitled: "Barge Carriers, Inc., special account, War Shipping Administration." From these funds the respondent pays all operating expenses, such as for repairs, fuel and wages. When, for example, the respondent needs funds for the payment of wages of the seamen, it draws a check upon this account covering the total amount of wages, submits the check for the approval of the W. S. A., and upon such approval may withdraw the funds from the special account.<sup>15</sup> For the services performed under the General Agency Agreement, the respondent receives a certain sum for each vessel per month, plus a bonus for each ton of cargo which is carried.

Although the execution of the General Agency Agreement thus circumscribed the respondent's

<sup>14</sup> The charter parties are signed by the respondent as follows:

The United States of America.

By War Shipping Administration.

By Barge Carriers, Inc., General Agent.

<sup>15</sup> The respondent, under the terms of the General Agency Agreement, must maintain a bond for the faithful performance of its responsibilities under the agreement.

control over the operation of the vessels, no substantial change occurred in the relationship between the respondent and the employees here concerned in respect to their wages, hours of employment, and similar conditions of employment. The respondent still hires the master, subject, however, to the approval of the W. S. A., and may discharge him. The master continues to select his crew from sources made available to him by the respondent. It was and is the respondent's practice to maintain a roster of applicants for positions aboard the vessels. When it is necessary to hire an employee, the respondent recommends to the master one of the applicants. The master continues to discharge employees, frequently at the recommendation of subordinate officers. Hours of duty, rest periods, and similar conditions aboard ship are controlled by the master. The respondent maintains the basic scale of wages which it had established prior to the execution of the General Agency Agreement. Subsequent to the execution of the General Agency Agreement, a representative of the W. S. A. requested information of the respondent as to the "wage schedules, overtime rates and working conditions of the personnel on tugs and barges operated by" the respondent for the account of the W. S. A. After submitting such information, the respondent was told to maintain its existing wage scale and other labor relations policies while operating for the account of the W. S. A. The W. S. A. has not otherwise exercised any control over the hire and tenure of employment, wages, hours of duty, or other conditions of employment of the personnel aboard the vessels operated by the re-

spondent. And it is plain from the testimony of members of the crew that they regard the respondent, and not the W. S. A., as their employer.

From the foregoing findings, considered in the light of the entire record, the undersigned is convinced that the respondent is the employer of the employees here concerned, within the meaning of the Act. The acquisition by the W. S. A. of the vessels and the execution of the General Agency Agreement effected no change in the relationship between the respondent and the employees here concerned. Nor, despite the control exercised by the W. S. A. over the sailings and cargo of the vessels, has there been any change in, or attempt by the W. S. A. to change, the working conditions of the employees. Realistically, it is plain that the labor policies concerning these seamen are controlled entirely by the respondent, under only nominal supervision of the W. S. A. The creation of the W. S. A. and the vesting in it of control over the shipping of the United States was a temporary measure designed to utilize more effectively such shipping for the prosecution of the war. The control exercised by the W. S. A. over the respondent's operations has been concerned largely with voyages and cargo, and not with labor relations. In excepting the United States as an employer from the application of the Act, the Congress cannot have intended the exception to apply to a situation in which for all practical purposes, the essential elements of the employer-employee relationship remain in the control of the private operator, under only nominal and temporary supervision of the W. S. A. In the *Cosmopolitan Shipping*



*Company* case,<sup>16</sup> in which the contractual relationship between the United States and the company there involved was substantially the same as that between the United States and the respondent, the Board said:

It appears to us that the Government, in turning over the operation and management of its vessels to a private corporation under the existing Agreement, has avoided, rather than assumed, the responsibilities of an employer. It has established the American France Line as a commercial venture, operating in competition with other lines. In the conduct of the business of the line, the Company is in full charge, receiving compensation based on the results of its own efforts. The Company, under the nominal supervision of the Government, does the actual hiring of the employees and has the sole direction of their activities while engaged in their duties on board the vessels. Under these circumstances, we do not feel that the Government can be said to be the employer of the engineers on its vessels. Furthermore, we are satisfied that the exemption of the Government for the operation of the Act was not meant to apply in the case of a commercial venture of this nature. We find, therefore, that the Company, in hiring the licensed engineers employed on the vessels which it operates, is an employer under the provisions of the Act.

<sup>16</sup> *Matter of Cosmopolitan Shipping Company, Inc.*, 2 N. L. R. B. 759. See also *Matter of Southgate-Nelson Corporation*, 3 N. E. R. B. 535; *Matter of Southgate-Nelson Corporation*, 4 N. L. R. B. 307.



The undersigned finds that the respondent is an employer of the employees aboard the vessels operated by the respondent, within the meaning of the Act.

\* \* \* \* \*

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

#### CONCLUSIONS OF LAW

1. Atlantic and Gulf District of the Seafarers International Union of N. A. is a labor organization within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Hans E. Hansen, thereby discouraging membership in Atlantic and Gulf District of the Seafarers International Union of N. A., the respondent has engaged and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

#### RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends

that the respondent, Barge Carriers, Inc., and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Atlantic and Gulf District of the Seafarers International Union of N. A., or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment, or any term or condition of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Hans E. Hansen immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges;

(b) Make whole Hans E. Hansen for any loss of pay he may have suffered by reason of the respondent's discrimination in regard to his hire and tenure of employment by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his dis-

charge, May 9, 1943, to the date of offer of reinstatement, less his net earnings during said period:

(c) Post immediately in conspicuous places on the vessels, which it operates, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notice to its employees stating that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a) and (b) of these recommendations; (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) (b) of these recommendations; and (3) that the respondent's employees are free to become or remain members of the Atlantic and Gulf District of the Seafarers International Union of N. A., or of any other labor organization, and that the respondent will not discriminate against any employee because of membership in or activity on behalf of that or any other labor organization;

(d) Notify the Regional Director for the Tenth Region in writing within ten (10) days from the date of the receipt of this Intermediate Report what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Rela-



tions Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring this case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to this Intermediate Report, or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

Robert F. Koretz,

ROBERT F. KORETZ,

*Trial Examiner.*

Dated March 17, 1944.